THE ATTORNEY-CLIENT PRIVILEGE AS APPLIED TO CORPORATIONS

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THE lawyer often finds himself at the entrance to a field that lacks markers, paths, or even a solitary footprint to show there were travelers before him. Perhaps the ground has never been crossed, or has long since been abandoned; but more commonly, there have been frequent visitors who left no trace. This last, one suspects, is the case with the subject matter of this analysis. No doubt the attorney-client privilege problems affecting corporations are mapped out in intra-office memos, in the practices of litigators, and in the thinking habits of judges.[1] However, there are only a handful of modern decisions dealing directly with some of the difficulties that arise in applying the traditional rules of the privilege to corporations.

It is generally assumed that corporations and other legal entities are entitled to the privilege just as much as individuals are. The idea seems to go unchallenged—perhaps because in law, as in life, many of the most deeply believed assumptions are unspoken. Indeed, one can imagine the response of the surprised practitioner to any suggestion that it be otherwise: "Why should a corporation not be entitled to the privilege? Cannot a corporation sue and be sued? Is it not punishable for its crimes? Does it not need legal advice of its own? How could it go about getting such advice if its confidences were not respected? It is an ancient rule that a master is privileged to consult with counsel through his servant, a principal through his agent—why not a corporation in the same way?"

These arguments certainly sound right as a matter of common law, and a few cases have so intimated.[2] Moreover, the American statutes codifying the common law attorney-client privilege generally refer to the "client" rather than to a "person,"[3] and perhaps a corporation would fit within the former

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1. Preservation of the privilege for corporate law departments was discussed in concise but illuminating fashion by Lawrence S. Apsey, Esq., at the Practicing Law Institute's 11th Annual Summer Session, July, 1952, in New York City. See PLI, CORPORATE HOUSE COUNSEL COURSE, LECTURE OUTLINES AND MATERIALS (1952).

2. Stewart Equipment Co. v. Gallo, 32 N.J. Super. 15, 107 A.2d 527 (L. 1954); *Ex parte* Schoepf, 74 Ohio St. 1, 77 N.E. 276 (1906); Mayor & Corp. of Bristol v. Cox, 26 Ch. D. 678, 682 (1884); *cf.* United States v. Louisville & Nashville R.R., 236 U.S. 318, 336 (1915); Lalance & Grosjean Mfg. Co. v. Haberman Mfg. Co., 87 Fed. 563, 564 (C.C.S.D.N.Y. 1898); Robertson v. Virginia, 181 Va. 520, 539, 25 S.E.2d 352, 360 (1943). Usually the point is assumed without discussion. *E.g.*, McWilliams v. American Fidelity Co., 140 Conn. 572, 581, 102 A.2d 345, 349 (1954); *cf.* Consolidated Theatres, Inc. v. Warner Bros. Cir. Management Corp., 216 F.2d 920 (2d Cir. 1954).

3. See the listing of statutes in 8 WIGMORE, EVIDENCE § 2292 (3d ed. 1940) (hereinafter cited as WIGMORE). The English Companies Act of 1948 codifies the privilege—

term more easily than the latter. Granting, then, as I believe we must, that under present law a corporation is clearly entitled to the privilege, the initial question is whether this result is justifiable.

First, let us examine the nature of the privilege, and the policies lying behind it. Wigmore states the rule thus:

> "Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived."[4]

Justifying the rule is the thought that legitimate legal assistance would be less effective if either client or attorney could be questioned about the client's confidences against the client's will.[5] It does seem likely that absent the rule clients would be less frank or, perhaps, that their lawyers would be less honest.[6] Of course, every evidentiary privilege excludes relevant facts and

presumably for corporations—in common-law terms. 11 & 12 GEO. 6, c. 38, § 175. See also the Exchange Control Act, 1947, 10 & 11 GEO. 6, c. 14, § 34, 5th Sch. § 1(3) ("any person").

The American Law Institute's Model Code explicitly defines "client" as "a person or corporation or other association that, directly or through an authorized representative," consults counsel. MODEL CODE OF EVIDENCE rule 209(a) (1942).

4. 8 WIGMORE § 2292, at 558. (Enumeration omitted.)

5. See, generally, 8 WIGMORE §§ 2290, 2294(3); MODEL CODE OF EVIDENCE rule 210, comment a (1942).

6. Some commentators have criticized the modern privilege as an outmoded protection largely benefitting perjurers and an unworthy obstacle to truth-seeking. See, *e.g.*, Radin, *Lawyer and Client*, 16 CALIF. L. REV. 487 (1928). Indeed, Professor Morgan has strongly hinted that the ALI's Model Code preserves the privilege only as a political concession to the organized Bar. Morgan, *Foreword*, MODEL CODE OF EVIDENCE 28 (1942). Along with Radin, Morgan suggests that the privilege is justified only as an aspect of the policy against self-incrimination and the rights of persons accused of crime. Radin, *supra* at 490, 493; Morgan, *op. cit. supra* at 27. Morgan seems to rest his reasoning on (1) a doubt that the privilege actually stimulates confidences, and (2) a suggestion that at least in civil matters there can be no legitimate motive for a client to wish information to be kept secret.

Argument (1) is of course a question of fact. Yet it is a rare lawyer who has not personally experienced the need for coaxing information from reticent or bashful clients. Whether or not the privilege assists in this process it seems likely that the attorney would pursue his inquiry with less vigor if he anticipated that he himself might be called as a witness. Argument (2) is really the nub of the matter, for there can be no doubt that the privilege sometimes serves to protect one who has done wrong. Yet, if the privilege were abolished, would there be any lasting improvement? Would not the very people who should be unmasked be able to find lawyers who could keep their confidences to themselves?

It seems to this writer that the true subjects of the privilege are the clients who are in the common position of not really "knowing" the facts because they do not understand the significance of what they think they saw or now remember. It is precisely because facts are subtle, elusive, and often unknowable that counsel (in civil as well as in criminal cases) is expected to show them in their best light, just as his adversary has the task of putting them in their worst. The entire process of cross-examining one's

is to that extent a mixed good. In this case, however, the original source of the information—the client himself—may always be questioned as to matters within his own knowledge, so that in many instances the privilege merely means that an attorney may not be called to impeach his own client.[7] On balance, the price for improving the client-attorney relationship does not seem too high.

As for corporations, they certainly benefit as much as any individual from legitimate legal assistance. This particular privilege should not be denied them merely because of their power, wealth or quasi-public position, since—unlike the privilege against self-incrimination, which they do not enjoy[8]—it is not intended as a shield to the weak, but rather as an encouragement to all, strong and weak alike, to consult freely with counsel.[9] In the long run, if our laws tend to be good, good legal advice should benefit society as well as General Motors.

Granting the need, what of the price? Where corporations are involved, with their large number of agents, masses of documents, and frequent dealings with lawyers, the zone of silence grows large. Few judges—or legislators

own client *in camera*, of finding and presenting facts whose exact contours may never be known, is in our society a vital aspect of legitimate partisanship. Perhaps there are some isolated areas of adjudication where clients should be required to throw themselves upon the mercy and discretion of an impartial inquisitor. Yet it hardly seems feasible to dispense with the adversary system everywhere and at one blow. The result would not be less partisanship, but a different kind, for the unscrupulous lawyer and the dishonest client would be able to thread a path that the more conscientious could never follow.

7. See 8 WIGMORE § 2291, at 557. Of course, the privilege is not conditioned on the availability of other evidence, and hardship cases are possible—as, for example, where the client has died. See 8 *id.* § 2323 (privilege survives client's death). The cost of the privilege in terms of missing evidence seems greatest when immunity is granted to writings given to the attorney. See text at pp. 978-81 *infra*. Thus, in England the modern privilege evolved from a struggle over the written "case made for counsel." 8 *id.* § 2294, at 566. As the cost increases, the temptation is to seek an ad hoc solution by making the immunity conditional on the subsequent need of the party demanding the inspection, and one recent case has suggested the possibility of implanting such a limitation on the common law privilege. See Frank C. Sparks Co. v. Huber Baking Co., 114 A.2d 657, 660 n.4 (Del. Super. Ct. 1955).

8. See 8 WIGMORE § 2259a. The privilege against self-incrimination seems to have been denied to corporate and other business entities because the policy of personal fairness is inapplicable and because the volume of their ordinary records makes any other result impractical. See United States v. White, 322 U.S. 694, 700-01 (1944) (labor union); United States v. Onassis, 133 F. Supp. 327, 335 (S.D.N.Y. 1955) (partnership).

9. Presumably similar reasoning explains the assumption that the government is as much entitled to the attorney-client privilege as are private persons. *E.g.*, Connecticut Mut. Life Ins. Co. v. Shields, 18 F.R.D. 448, 450 (S.D.N.Y. 1955) (attorneys for state bridge commission); Cogdill v. TVA, 7 F.R.D. 411, 415 (E.D. Tenn. 1947) (TVA general counsel); Holm v. Superior Court, 42 Cal. 2d 500, 267 P.2d 1025 (1954) (counsel for city transit authority); Rowley v. Ferguson, 48 N.E.2d 243, 248 (Ohio App. 1942) (state attorney general). *Cf.* Alltmont v. United States, 177 F.2d 971 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950) (interviews taken by FBI for government counsel may qualify as "work product"); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 462-63 (D. Mich. 1954) (same).

either, for that matter—would long tolerate any common law privilege that allowed corporations to insulate all their activities by discussing them with legal advisers. It is this risk, and this challenge, that underlie a number of attorney-client privilege problems peculiar to corporations. Among the problems are these: Through whom may a corporation speak as client: directors? officers? employees? stockholders? When is a corporation's attorney—including "house counsel"—acting as an attorney, and when as an unprivileged investigator, businessman or corporate functionary? To what extent should the attorney's activities immunize ordinary corporate records? May communications with counsel be stored in the corporation's open files? How many corporate agents may be present at a meeting with counsel? What of subsequent litigation between the corporation and its agents?

WHO SPEAKS FOR THE CLIENT?

The privilege protects only communications between the client and his attorney. It does not protect the confidential disclosures of "third parties," even though the lawyer may be seeing those parties at the instance of his client,[10] for this relationship is not of the kind that the privilege seeks to foster.

The distinction between "client" and "third party," as applied to corporations, presents a basic dilemma. A corporation can speak only through its representatives. Unless some of them can speak as client all disclosures on behalf of the corporation will necessarily be reduced to the unprivileged status of third party statements. Yet, if a corporation were permitted to designate anyone at all as its spokesman, or to adopt as its own any disclosures made for it, the corporate privilege would be extended far beyond that allowed to the individual client. The problem cannot be solved by a simple reference to the law of agency, for it is not enough that the spokesman is a corporate agent; the question is whether the good that the privilege seeks to accomplish —candor between client and attorney—would be defeated unless the particular agent were permitted to speak for the corporation.

Directors and Officers

If anyone can act for a corporation in seeking legal advice, surely it is a director or an officer. Although authority is scant, it seems fairly safe to assume that a vote by the board of directors, or by the shareholders, would ordinarily not be necessary to constitute such officials corporate spokesmen.[11]

10. See 8 WIGMORE § 2317(1). *Compare In re* Aspinwall, 2 Fed. Cas. 64, No. 591 (S.D.N.Y. 1874) *with* Matter of King v. Ashley, 179 N.Y. 281, 72 N.E. 106 (1904). In Texas, by statute, the privilege extends to the client's communications and to "any other fact which came to the knowledge of such attorney by reason of" his relationship with his client. TEX. CODE CRIM. PROC. ANN. art. 713 (Supp. 1955).

11. See United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 359 (D. Mass. 1950) ("officers and employees"); Zenith Radio Corp. v. RCA, 121 F. Supp. 792, 795 (D. Del. 1954) ("employees, officers, directors"); *cf.* Stewart Equipment Co. v. Gallo, 32 N.J. Super. 15, 107 A.2d 527 (L. 1954) (privilege upheld for disclosure by vice-

If the day-to-day legal affairs of corporations are to be carried forward in a practical fashion, the director or officer should be permitted the privilege for confidential disclosures bearing on corporate matters within the area of his responsibility. With respect to directors still in office, it is hornbook law that they are responsible for the corporation as a whole and should interest themselves in all its affairs.[12] Thus any disclosure on corporate matters by a director should qualify, even if the director is in fact inactive or a "dummy." Where officers are concerned, the communication might have to come within the speaker's proper area of responsibility in order to qualify as a corporate confidence. The circle of officers is such a small one, however, that no substantial harm would be risked in permitting the corporation to constitute any of its officers a spokesman on all corporate legal affairs.

Disclosures by ex-directors and ex-officers might raise special problems. There would perhaps have to be some showing that it had become necessary for them to readopt the roles they had given up. It might be, for example, that an ex-officer was the only source of information on certain matters with which he had dealt during his term of office. Even so, a vote from the board might be needed to reconstitute him a corporate confidant.

Suppose a director or officer makes a disclosure of personal misconduct in regard to corporate matters. If the speaker is requesting purely personal legal advice, or reasonably understands that he is to receive such advice, then the privilege probably belongs to him personally rather than to the corporation.[13] If the speaker later permitted repetition of the disclosure within the corporation, he would be waiving his personal privilege. In short, it would be important to determine whether the disclosure was a corporate or a personal one, or both, in its inception—to determine, that is, on whose behalf the legal advice was being sought.

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president who was also sales manager; opinion seems to assume that director could also qualify). It should be kept in mind that there may be less implied authority for directors than for officers. *Cf.* Campbell v. General Motors Corp., 13 F.R.D. 331 (S.D.N.Y. 1952) (corporate party not examinable through a director who was not an officer, because of express language of FED. R. CIV. P. 37(d), which so provides because a corporation cannot compel a director's attendance). To be on the safe side, counsel may wish to limit his interviews with directors—absent a resolution by the board—to those who are also officers.

12. *E.g.*, BALLANTINE, CORPORATIONS §§ 42, 62 (rev. ed. 1946).

13. *Cf.* Livezey v. United States, 279 Fed. 496, 499 (5th Cir.), *cert. denied*, 260 U.S. 721 (1922).

Quaere whether the lawyer for the corporation should knowingly allow himself to be placed in such a position. *Compare* ABA, OPINIONS OF COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 405 (1947) (corporate counsel should disclose to board of directors information concerning wrongful acts of executive officers communicated to him in course of their duties; such a disclosure would be "to the client itself and not to a third person") *with* Cleveland Bar Ass'n, *Ethics Committee Report*, 25 OHIO L. REP. 569 (1927) (corporate counsel may not disclose to board of directors confidential communication of employee who embezzled and then asked him as personal attorney for assistance in making good the deficit).

Employees

"Employees" range from the truck driver up to the division chief who is about to become a vice-president; both of these may be authorized to speak for the corporation on matters related to their duties. But to blanket all their disclosures with the attorney-client privilege would keep a substantial volume of information within the corporation. In this area, therefore, the policy considerations that favor restricting the circle of corporate spokesmen become particularly urgent.

In the federal courts the chief doubt as to employees stems from *Hickman v. Taylor*[14] and its progeny.[15] The *Hickman* case is well known for the qualified immunity from federal pre-trial discovery that it afforded the "work product of the attorney." It is less known for a statement, which may be viewed either as dictum or as a preliminary part of the holding, that the material sought to be discovered was not entitled to the protection of the attorney-client privilege.[16] That statement was apparently predicated on an assumption, shared by the two lower courts,[17] that an employee necessarily speaks as a third party witness when he is interviewed by his employer's attorney.

In the *Hickman* case the client was a two-man partnership which owned seven tugs. It had no claims department and no employees regularly charged with investigation; its office force consisted of no more than three persons. After one of the company's tugs had capsized, the partnership retained an attorney in contemplation of pending litigation. He interviewed the four crew members—all employees of the partnership—who had survived the accident. His reports and recollections of these interviews were among the materials the plaintiff sought to obtain.[18]

All three courts assumed that the interviews were with "witnesses" or with "third parties" and hence not within the attorney-client privilege.[19] Nowhere is there any mention of the possibility that the crew members, being employees,

14. 329 U.S. 495 (1947).

15. See, generally, Note, 62 HARV. L. REV. 269 (1948).

16. 329 U.S. at 508, 516. FED. R. CIV. P. 26(b) and 34 permit depositions or discovery as to designated matters, if "not privileged." The term "privileged" seems to be intended in its traditional evidentiary sense. 4 MOORE, FEDERAL PRACTICE ¶ 26.22 (2d ed. 1950); *accord*, Humphries v. Pennsylvania R.R., 14 F.R.D. 177, 181 (N.D. Ohio 1953); Wild v. Payson, 7 F.R.D. 495, 499 (S.D.N.Y. 1946). As to whether state law defining privilege applies in diversity cases, see text at notes 30-31 *infra*.

17. 4 F.R.D. 479, 482 (E.D. Pa. 1945); 153 F.2d 212, 222 (3d Cir. 1945). Since the district court sat en banc, no less than twenty-four federal judges in three courts passed on the question and ruled against the common law privilege. *Cf.* Morgan, *The Law of Evidence, 1941-1945*, 59 HARV. L. REV. 481, 518 (1946).

18. These facts are set forth in the district court's opinion, 4 F.R.D. 479, 481 (E.D. Pa. 1945). The two higher courts, to judge from their silence, may have considered the structure of the partnership irrelevant.

19. See 4 F.R.D. at 481, 482; 153 F.2d at 222; 329 U.S. at 508, 518. It is noteworthy that the common law privilege question seems to have disappeared from the case by the time it reached the Supreme Court. Respondent, in a memorandum filed after the argument, merely argued that under a number of rather ancient cases the privilege did extend

were speaking to the attorney on behalf of the partnership. It is conceivable that the privilege was not applied because the client was a partnership rather than a corporation, but there is no hint of this distinction in any of the opinions. In short, the assumption seems to have been that only the two partners could serve as the source for communications by the "client" to the attorney.[20]

In contrast to the *Hickman* assumption regarding partnership employees is Judge Wyzanski's illuminating opinion in *United States v. United Shoe Machinery Corp.*[21] In an earlier case the government had subpoenaed quantities of corporate records for grand jury inspection in an antitrust prosecution. The grand jury refused to indict, and the records were returned. Then in a subsequent civil action a considerably broader subpoena demanded a large number of letters to and from counsel which dealt, for the most part, with the company's patent business. On a motion to quash or limit the subpoena, it was held, *inter alia*, that "information furnished [to the attorney] *by an officer or employee* of the defendant [corporation] in confidence and without the presence of third persons" may be privileged, but that "facts disclosed to the attorney by *a person outside the organization* of defendant [corporation] and its affiliates" are not.[22] As support for the latter branch of his holding, Judge Wyzanski cited *Hickman* for the classic rule as to "witnesses,"[23] but did not explain whether he meant that the "employees" here were different, or if so, which employees might be considered "inside" the organization and which "outside."

United Shoe and *Hickman* can be reconciled on their facts, but their doctrines seem to be in conflict, since one case stands for withholding the privilege from employee statements, the other for extending it. *Hickman* might, for instance, be taken as merely illustrating a reluctance to accord more than a qualified protection to accident reports—which were not involved in *United Shoe*. But many of the federal discovery cases citing *Hickman* as authority for denying the privilege have failed to draw any clear distinctions either be-

to third party witnesses. Supplemental Memorandum for Respondent, pp. 2-3, Hickman v. Taylor, 329 U.S. 495 (1947).

20. The district court added the refinement that the lawyer was "merely the medium through which his client becomes apprised of facts." 4 F.R.D. at 482. The case could perhaps be distinguished on the grounds that (a) the accident report was a business record, see notes 90-92 *infra* and accompanying text; or (b) the lawyer was acting in a non-legal capacity, *i.e.*, as an investigator, see note 66 *infra*; or (c) the disclosure was not made on behalf of the entity because the employees had claims of their own pending, see note 116 *infra*. Ground (c) is the only one that seems to have merit on the reported facts, and is perhaps slightly evoked by the statement that the crew members were "third parties."

21. 89 F. Supp. 357 (D. Mass. 1950).

22. *Id.* at 359. (Emphasis added.)

23. *Ibid.* The pertinent portion of the page from *Hickman v. Taylor* cited by Judge Wyzanski states, "For present purposes, it suffices to note that the protective cloak of this [attorney-client] privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation." 329 U.S. at 508.

tween various types of employees or between their different kinds of reports.[24] On the other hand, it may be that Judge Wyzanski had in mind privileged treatment only for the office help in contrast to "outside" drivers and the like—or, even more likely, he was thinking of employees whose duties involve such "inside" matters as asking for legal assistance or making managerial or policy decisions. If this was what he meant, he did not say so. Nor did another distinguished district judge who recently followed *United Shoe* in dealing with an application for production of some 1,600 corporate documents in a private patent controversy.[25] His opinion says nothing of "inside" or "outside" employees; instead, it can be read for the broad proposition that any persons not "strangers"—that is, anyone "affiliated with the corporation as employees, officers, directors"—are qualified to speak for the corporate client.[26]

The state courts offer a contrast to *Hickman v. Taylor*; a long and respectable line of decisions have held that under the proper circumstances accident reports of motormen, insurance agents, claims adjusters and the like may be privileged when prepared for submission to company counsel with a view to obtaining legal advice.[27] These state cases deal indiscriminately with cor-

24. Privilege not applicable, citing *Hickman v. Taylor*: Humphries v. Pennsylvania R.R., 14 F.R.D. 177, 178 (N.D. Ohio 1953) (accident reports of "employees, agents, crew members and witnesses"); Brookshire v. Pennsylvania R.R., 14 F.R.D. 154 (N.D. Ohio 1953) (accident reports of engineer, conductor and supervisor of tracks); Cogdill v. TVA, 7 F.R.D. 411, 414 (E.D. Tenn. 1947) (accident report by defendant's driver; privilege not to be recognized "ipso facto" under the rules); Connecticut Mut. Life Ins. Co. v. Shields, 16 F.R.D. 5, 7, 8 (S.D.N.Y. 1954) (dictum; reports by house counsel referring to communications with "other than his [corporate] employer fall outside the scope of the attorney-client privilege" but discovery denied on basis of work-product rule); Portman v. American Home Products Corp., 9 F.R.D. 613, 615 (S.D.N.Y. 1949) (dictum; general counsel procured unprivileged statements from present and former employees of subsidiary but discovery denied because no showing of necessity); *cf.* Scourtes v. Fred W. Albrecht Grocery Co., 15 F.R.D. 55 (N.D. Ohio 1953); Panella v. Baltimore & O.R.R., 14 F.R.D. 196 (N.D. Ohio 1951).

Privilege upheld without discussion: Gillig v. Bymart-Tintair, Inc., 16 F.R.D. 393 (S.D.N.Y. 1954); Bernstein v. N.V. Nederlandsche-Amerikansche Stoomvaart-Maatschappij, 15 F.R.D. 32, 35 (S.D.N.Y. 1953).

25. Zenith Radio Corp. v. RCA, 121 F. Supp. 792, 794 (D. Del. 1954) (Judge Leahy). For the subsequent disposition of other documents in the same litigation, see 16 F.R.D. 356 (D. Del. 1954).

26. Zenith Radio Corp. v. RCA, 121 F. Supp. 792, 795 (D. Del. 1954). See note 100 *infra* and accompanying text.

27. *E.g.*, Holm v. Superior Court, 42 Cal. 2d 500, 267 P.2d 1025 (1954) (routine accident report by city motorman privileged because submission to counsel was "dominant purpose"; dissent says test should be whether report would not have been prepared otherwise), 1 U.C.L.A. L. Rev. 605 (1954) (result supported); Atlantic Coast Line R.R. v. Williams, 21 Ga. App. 453, 94 S.E. 584 (1917) (report on a standard printed form); Schmitt v. Emery, 211 Minn. 547, 2 N.W.2d 413 (1942) (employee's accident report submitted to claims agent upon advice of and for use of counsel), 26 Minn. L. Rev. 744 (1942) (result supported), 28 Va. L. Rev. 1133 (1942) (rule criticized); *In re* Hyde, 149 Ohio St. 407, 414, 79 N.E.2d 224, 227 (1948) (distinguishes between accident reports

porations, partnerships and individual proprietorships, and seem to rely simply on the logic of the ancient rule that the client may utilize an agent for his communication to the attorney. For example, one relatively recent dictum says broadly:

> "A statement by the accredited agent of a corporation, giving his account of how an accident occurred, and given for the use of counsel in pending or threatened litigation is . . . privileged."[28]

It is noteworthy that the state courts, while they have taken pains to define the circumstances under which an accident report may be privileged, seem to have been principally concerned with preventing ordinary business records from masquerading as attorney-client communications. They do not suggest

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and "matters of record with the company for general purposes" which the company would have "irrespective of any accident"); *In re* Klemann, 132 Ohio St. 187, 5 N.E.2d 492 (1936) (accident report of insured's employee forwarded to insurer and by insurer to its attorney); *Ex parte* Schoepf, 74 Ohio St. 1, 77 N.E. 276 (1906) (conductor's accident report forwarded to corporation's claim agent for settlement or for use of counsel in event of suit); Davenport Co. v. Pennsylvania R.R., 166 Pa. 480, 31 Atl. 245 (1895) (local railroad agent's written report forwarded to his superior for delivery to counsel).

Compare the following cases, where the privilege was denied on grounds other than the unprivileged status of employees: *In re* Keough, 151 Ohio St. 307, 310-11, 314, 85 N.E.2d 550, 552-54 (1949) (dictum in *In re* Hyde, *supra*, followed and information "from the general records of the city which were made and kept without regard to any accident" held subpoenable even though given to defense counsel in accordance with "a custom of some years standing." Records that came into existence as the result of the accident would be "'privileged in the hands of the city"; but the court's syllabus seems to specify accident reports that are "turned over to and remain in the possession of the company's legal department"); Colpak v. Hetterick, 40 F. Supp. 350 (E.D.N.Y. 1941) (investigation "by the [insurance] company itself and not by its attorney"); Wise v. Western Union Tel. Co., 36 Del. 456, 178 Atl. 640 (Super. Ct. 1935) (report by one branch office to another, with request that home office not be informed); Curtis v. Indemnity Co., 327 Mo. 350, 37 S.W.2d 616 (1931) (letters between insurance company and its adjustor prior to litigation); Davies v. Columbia Gas & Elec. Co., 68 N.E.2d 571, 579 (Ohio C.P. 1938), *aff'd*, 68 N.E.2d 231 (Ohio Ct. App. 1939) (*Ex parte* Schoepf, *supra*, distinguished because documents not prepared "exclusively" for counsel and did not remain in counsel's possession "continuously after their preparation"); Savage v. Canadian Pac. Ry., 16 MANITOBA L.R. 381 (1906) (accident report made on form headed "For the information of the solicitor of the company and his advice thereon"); *cf.* Hurley v. Connecticut Co., 118 Conn. 276, 172 Atl. 86 (1934) (dictum; motorman's report made for preparation against possible but not pending litigation); Wolff v. Capital Transit Co., 35 A.2d 454 (D.C. Mun. App. 1944) (dictum; motorman's report). Additional cases are collected in Annots., 139 A.L.R. 1250 (1942), 146 A.L.R. 977 (1943).

The accident report cases have been discussed at length by the commentators, though not in regard to the specific problems of corporate counsel. See 8 WIGMORE § 2319 (largely English cases). Wigmore observes—erroneously, it would seem—that there has been "very little development" in the United States. *Id.* at 624. See also 4 MOORE, FEDERAL PRACTICE ¶ 26.23(3) (2d ed. 1950); 1 MORGAN, BASIC PROBLEMS OF EVIDENCE 100-01 (1954); Comments, 21 U. CHI. L. REV. 752 (1954), 88 U. PA. L. REV. 467 (1940); Note, 1943 WIS. L. REV. 424.

28. Robertson v. Virginia, 181 Va. 520, 540, 25 S.E.2d 352, 360 (1943). See also Stewart Equipment Co. v. Gallo, 32 N.J. Super. 15, 17, 107 A.2d 527, 528 (L. 1954)

distinctions among the types of corporate agents, but seem rather to have assumed that any employee might speak for the corporate client, provided his disclosure was attributable to the intervention of the attorney acting in a legal capacity. Hardly any of the recent state cases have seen fit to consider the conflicting assumption of *Hickman v. Taylor*—and perhaps of *United Shoe* as well—that some employees can only speak as third-party witnesses.[29] For example, the state courts in Ohio have ignored the federal cases, while the federal district courts in Ohio have expressly refused to follow the state rule on accident reports.[30]

One can only conjecture what effect, if any, this conflict of authorities will have on jurisdictions that are not yet committed on the question. As for the federal courts, it may be that under federal procedure they are free to admit, as unprivileged, disclosures that the state courts choose to protect.[31]

("Since a corporation can only act through its agent, it must necessarily follow that if the attorney-client privilege is to extend to corporations, as it does, . . . it must necessarily extend to confidential communications made by the agent of the corporation.").

29. *But cf.* Frank C. Sparks Co. v. Huber Baking Co., 114 A.2d 657, 660 n.4 (Del. Super. Ct. 1955). A number of states have adopted the general "work product" concept of *Hickman v. Taylor*, but it is not clear whether they would also agree that employees' accident reports can never be anything more than "work product." *E.g.*, Seaboard Air Line Ry. v. Timmons, 61 So. 2d 426 (Fla. 1952); State *ex rel.* Terminal R. Ass'n v. Flynn, 363 Mo. 1065, 257 S.W.2d 69 (1953).

30. See Ohio federal and state cases cited in notes 24 and 27, *supra*. *But cf.* Reeves v. Pennsylvania R.R., 8 F.R.D. 616 (D. Del. 1949) (Delaware decisional law, rather than *Hickman v. Taylor*, followed in diversity case, and privilege upheld for an accident report); Blank v. Great Northern Ry., 4 F.R.D. 213 (D. Minn. 1943) (Minnesota rule cited). See also Pennsylvania R.R. v. Julian, 10 F.R.D. 452 (D. Del. 1950) (routine accident report admissible under both *Hickman v. Taylor* and local law). District Judge Rodney, in the *Reeves* and *Julian* cases, *supra*, was following his own prior decision as a Delaware judge. See Frank C. Sparks Co. v. Huber Baking Co., 114 A.2d 657, 660 (Del. Super Ct. 1955).

31. In criminal proceedings, the federal courts follow their own views of the common law in defining evidentiary privileges. FED. R. CRIM. P. 26; Petition of Borden Co., 75 F. Supp. 857, 859-60 (N.D. Ill. 1948). In civil proceedings the situation is not so clear. Apparently even in diversity cases the federal courts are not bound to follow state judicial rules of privilege which exclude evidence. See Green, *Federal Civil Procedure Rule 43(a)*, 5 VAND. L. REV. 560 (1952); 4 MOORE, FEDERAL PRACTICE ¶ 26.23[9] (2d ed. 1950). Moreover, with respect to federal civil discovery, the framers of the Federal Rules seem to have contemplated an expanded procedure which would ordinarily operate without regard to state restrictions. In *Hickman v. Taylor*, a Jones Act case, the opinion remarks that "it is unnecessary here to delineate the content and scope of the [attorney-client] privilege as recognized in the federal courts" and—apparently deliberately—chooses to ignore the existence of conflicting state cases on accident reports. 329 U.S. at 508, 510 n.9. See also the Ohio district court cases cited in note 24 *supra*. Nevertheless, there is some authority for the view that state *statutory* privileges which exclude evidence may—or perhaps must—be followed in federal diversity cases. *E.g.*, Palmer v. Fisher, 228 F.2d 603, 607-08 (7th Cir. 1955) (statutory privilege for accountants); Berdon v. McDuff, 15 F.R.D. 29 (E.D. Mich. 1953) (same). See, generally, Note, 5 VAND L. REV. 590, 604-06 (1952); Green, *The Admissibility of Evidence Under the Federal Rules*, 55 HARV. L. REV. 197, 208-09 (1941).

Nevertheless, the local rule may at least be persuasive in the detailed federal application of either *Hickman v. Taylor* or *United Shoe.*

Suggested Analysis of the Employee Problem

I suggest that, for purposes of the privilege problem, corporate employees and other agents can be classified as (1) managing agents, (2) communicating agents, and (3) source agents.[32] A managing agent, in this sense, is one who has authority to undertake action or make decisions in regard to dealings with corporate counsel. A communicating agent is one who simply forwards information. A source agent is one who is himself the source of the information being disclosed or forwarded. All three capacities may be combined in one individual. For example, a company claims adjuster, working with the company attorney, would be acting as a managing agent when he formulated policies on the conduct of the litigation, the handling of negotiations or the preparation of evidence. He would be acting as a communicating agent when he interviewed the company motorman (a source agent) and turned over the interview to counsel. He would be a source agent when he reported to counsel on the motorman's demeanor or on his own inspection of the scene of the accident.

I suggest that the principles of agency law are adequate for testing whether managing agents or communicating agents are qualified as spokesmen for the client, but are inadequate in regard to source agents.

Managing agents simply perform the same function for the corporation that an individual client would ordinarily do for himself. In the words of an English judge who upheld the privilege for communications from a corporate committee, "the corporation is perfectly justified in referring all these [legal] matters to a committee and asking the committee to deal with them as it would deal with them itself, and they are simply the agents of the corporation for the purpose of considering what ought to be done."[33] The rules of agency law should be used to test whether the corporation has turned over the management of a particular legal consultation to the agent in question. Indeed, no reason suggests itself why a subsequent ratification or adoption of managerial action undertaken on the corporation's behalf would not be sufficient.

When communicating agents are involved, the only restriction on the privilege should be the principle of confidentiality, which requires that disclosure of the information to the communicating agent be justified by necessity or other-

32. As to the distinction between communicating and source agents, see 1 MORGAN, BASIC PROBLEMS OF EVIDENCE 100-01 (1954); as to the term "managing agents," see Comment, 50 MICH. L. REV. 308, 310 (1951). For an interesting illustration of a combined managing, communicating and (perhaps) source agent for individual plaintiffs, see Danisch v. Guardian Life Ins. Co., 18 F.R.D. 77 (S.D.N.Y. 1955).

33. Mayor & Corp. of Bristol v. Cox, 26 Ch. D. 678, 682 (1884). *Accord,* Lalance & Grosjean Mfg. Co. v. Haberman Mfg. Co., 87 Fed. 563, 564 (C.C.S.D.N.Y. 1898).

wise consistent with the alleged desire for secrecy.[34] Subject to this requirement, there is no reason why a stenographer, interpreter, or the United States mails (in the sense that letters would be privileged) could not be authorized to forward information on behalf of the corporation, or why such forwarding could not be ratified or adopted by the corporation. Thus an agent could be empowered to interview directors and submit this material to counsel, when distance, convenience, or some other reason made this form of communication appropriate. The information should be treated as privileged, since the agent has intervened only as a forwarding channel for corporate spokesmen. On the other hand, even a professional company interviewer could not convert interviews with third party witnesses into privileged communications any more than the ordinary client could.

It is where the third person is himself the source of the information that a mere authority to disclose on behalf of the client is not always sufficient to change his true colors from witness to client. At the very least, the information disclosed for the client by the source agent should have been obtained in the necessary course of his agency; a client should not be permitted to expand the scope of "his" protected confidences indefinitely either by authorizing others to make disclosures to his attorney or by ratifying such disclosures after they are made.[35] Only the exigencies of a business that necessarily carries

34. The same requirement of confidentiality is at work when a communicating agent —such as an interpreter or stenographer—is present at a conference between client and attorney. *Cf.* Bowers v. State, 29 Ohio St. 542, 546 (1916); State v. Loponio, 85 N.J.L. 357, 362, 88 Atl. 1045, 1047-48 (1913); see pp. 982-84 *infra.*

Presumably no special showing of necessity would be required when the United States mails or a messenger are used to forward a sealed communication to the attorney, since there has been no disclosure to the communicating agent. However, the privilege does not prevent testimony by a third party who, unbeknownst to client or attorney, intercepts a confidential communication. *E.g.*, Clark v. State, 159 Tex. Crim. App. 187, 261 S.W.2d 339 (1953), *cert. denied*, 346 U.S. 855 (1953) (eavesdropping on long-distance call by telephone operator), 29 N.Y.U.L. REV. 1295 (1954) (ruling criticized), 32 TEXAS L. REV. 615 (1954) (same); Erlich v. Erlich, 278 App. Div. 244, 104 N.Y.S.2d 531 (1st Dep't 1951) (wiretap); State v. Perry, 4 Idaho 224, 38 Pac. 655 (1894). This is generally rationalized by the argument that it is up to the parties to the confidence to assure privacy, see 8 WIGMORE § 2326, but this notion—akin to contributory negligence—is hard to reconcile with the view that the privilege is intended as protection for the client's freedom of communication with his attorney, rather than as a kind of prize for diligence.

35. Wigmore describes a communication from a "third person" as unprivileged even though it is "for the benefit of the client," whereas a communication "originating with the client's agent" is considered privileged. 8 WIGMORE § 2317, at 616. This section of Wigmore is cited in *United Shoe*, 89 F. Supp. at 359, but only for the "third person" portion of the rule. *Quaere* whether Wigmore means that the client can always authorize a third person to speak for him and thereby constitute him as "agent." More likely, he has in mind an authorized speaker who is already an agent with respect to other matters. See, *e.g.*, 8 WIGMORE § 2319, at 618-19: "[T]he more clearly the communicator is a stranger to the parties, the more plainly he falls without the privilege; while the more markedly the relation of agent for the litigation appears, the clearer the privilege is."

out its activities and discloses its accumulated information through agents, should suffice to justify judicial protection of source agent-attorney disclosures.[36] In the case of a corporate client, the nature of the entity, the number of its source agents and the role they play in its operations, would all seem relevant to the result.

As to source agents, the "work product" formula suggested by the *Hickman* case is inadequate. Under the rationale of that decision, protection of employee statements—like those of any other witness—would be limited to disclosures made in preparation for litigation and would depend on the wavering lines of "attorney's work product"; in addition, the protection would be conditional on the need of the person seeking the disclosure.[37] Yet there seems ample reason to afford a higher degree of protection to confidences of employees than to those of ordinary witnesses.

Two general lines of approach are available to put reasonable bounds on the privilege of source agents: limit strictly the type of *records* that will be protected, as the state courts suggest; or else treat only selected employees as qualified source agents, as *United Shoe* suggests. A practical solution would be to imbue the state cases with *United Shoe*. Thus, all employees could be allowed to act as source agents, but any documents prepared by or in reliance on motormen, drivers, and other lower-ranking source agents not identified with management would be treated as prima facie business records and ordinarily denied the privilege, unless the company affirmatively demonstrated the significance of the lawyer's intervention in the making of the record.

It should be borne in mind that the suggested protection for reports which at the corporate lawyer's direction are obtained from source agents would in no way draw the mantle of privilege over the knowledge of such agents, apart from the report to counsel. This should be true even where the source agent acquires his knowledge as a result of an investigation instituted at the attorney's behest. Conceivably, the *Hickman* "work product" rule may extend to protect the thinking processes not only of attorneys but also of certain of their expert advisers or assistants,[38] but the common law never extended such protection to the client's thoughts.

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36. The labor union that intervened as amicus curiae in *Hickman v. Taylor* urged that employers should not be permitted to insulate the reports of their employees against discovery. Brief for United R.R. Workers, p. 5, Hickman v. Taylor, 329 U.S. 495 (1947). Mr. Justice Murphy was prompted to advert to the possible danger of a "dark veil" of corporate secrecy, but concluded that it was "unsatisfactory" to frame the problem of discovery "in terms of assisting individual plaintiffs in their suits against corporate defendants." 329 U.S. at 506-07. Perhaps he meant that it was more satisfactory to decide that all employees are "witnesses" without giving the reason.

37. See, generally, Tarne, *Discovery of Trial Preparations in the Federal Courts*, 50 COLUM. L. REV. 1026, 1053-62 (1950); Note, 62 HARV. L. REV. 269 (1948); 4 MOORE, FEDERAL PRACTICE ¶ 26.23 *passim* (2d ed. 1950). Compare notes 87, 89 *infra*.

38. See, *e.g.*, Lewis v. United Air Lines Transp. Corp., 32 F. Supp. 21 (W.D. Pa. 1940).

In this respect there would theoretically be an important distinction between a communicating agent and a source agent. Any attempt to question a mere communcating agent about "knowledge" obtained from the client would, by definition, be an improper effort to elicit the privileged report to the attorney. But in practice, things may not work out so neatly. In the first place, difficulties may arise in pigeonholing thoughts of a corporate communicating agent who acquires knowledge of his own in the course of transmitting information for others. Suppose that at the attorney's prompting an officer of the company shows an investigator around the plant and makes confidential disclosures in regard to its observed physical operations, which are to be communicated to the attorney. It seems fairly clear that the investigator cannot be questioned about his report to counsel, whether he be viewed as source or as communicating agent. However, the sum total of his own knowledge has increased. Can he be questioned about that knowledge, or would the questions necessarily go to the communication from the corporate source—the officer—to the attorney?[39]

Apart from the classification problem, there is the question whether the immunity of a communicating agent is anything more than a kind of best evidence rule. Suppose an officer who was the source agent is dead or unavailable, and the only way of tracking down what he said is to question the company investigator who relayed his story to the attorney. Similar hard cases may arise with individual clients, but the likelihood is multiplied as the number and kinds of source agents increase. One might expect a court, when confronted with such a case, to lean towards a finding that the missing officer was not making a disclosure prompted by the need for legal advice. If the original source were only an employee instead of an officer, the court might decide that he spoke as "witness" rather than as "client." Alternatively, there would be a temptation to equate the investigator to a source agent who could be questioned about his knowledge, particularly where his two functions were intermingled.

All these considerations suggest strongly that if the lawyer wishes to minimize his risks he would do well to interview the source officer or employee himself wherever he can.

Stockholders

There seem to be no American cases dealing with the status of stockholders as privileged spokesmen for the corporation. Of course, corporate counsel might consult with a stockholder alone as his personal attorney, or the stockholder might reasonably believe this to be the case. Again, where both stockholder and corporation are interested in a legal problem, the stockholder and officers of the corporation could enter upon a joint consultation with corporate

39. *Cf.* San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951) (doctor acted as "intermediate agent" in examining client for attorney; held: both the doctor's observations and the client's disclosures were protected by client-attorney privilege. Were the disclosures inextricably intertwined?).

counsel for the purpose of receiving legal advice upon a common problem.[40] And the stockholder, like anyone else, could be employed by the corporation as a communicating agent to forward information from the corporation to its attorney, or as a managing agent to direct litigation and consult with counsel. In all these cases the stockholder's communications to the attorney could be privileged.

But what of the case where corporate counsel interviews the stockholder, alone or with officers of the company, as a source of information for formulating legal advice to the company? It is at least arguable that the proper management of corporate affairs requires encouragement of confidences between stockholders and corporate attorneys in regard to those corporate activities in which the stockholder often plays a vital role: formation of the corporation, annual meetings, elections of directors, ratification of by-laws, approval of actions of the board, and the like. However, the cases dealing with employees suggest that the courts will go no further than the rules of agency in deciding who may speak for the client. If agency is a minimum requirement, an assertion of the privilege might founder on the hornbook rule that a stockholder is not an agent of the corporation and may not bind it in tort or in contract.[41] Accordingly, under a strict agency theory, except perhaps where the stockholder dominated the corporation or it was otherwise appropriate to pierce the corporate veil,[42] an interview with a stockholder on the part of corporate counsel would be treated as an interview with an outsider.

Still, it appears that a shareholder vote may amount to a binding admission against interest by the corporation.[43] Even a single shareholder may enforce

40. As to joint consultations by individual clients, see text following note 111 *infra*. It is sometimes said that an attorney need represent only one of the persons present, but this probably means only that he need not be retained or paid by both, it being enough that all persons present reasonably believe they are to be given legal advice on a mutual problem. *Compare* Hartness v. Brown, 21 Wash. 655, 667, 59 Pac. 491, 494 (1889) (formal representation of both not necessary if there is a mutual problem and mutual trust) *with* Vance v. State, 190 Tenn. 521, 527, 230 S.W.2d 987, 990, *cert. denied*, 339 U.S. 988 (1950) (unprivileged because defendant had other counsel and there was no "joint defense"). As to the related problem of inter-attorney exchanges of information, see Note, 63 YALE L.J. 1030 (1954).

41. See, generally, BALLANTINE, CORPORATIONS §§ 118, 124-26 (rev. ed. 1946).

42. *Cf.* United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 359 (D. Mass. 1950):

> "For present purposes the client is United Shoe Machinery Corporation and all its subsidiaries and affiliates considered collectively. These corporations all used the same outside and inside counsel. The legal affairs of these corporations were closely related. Except for convenience in billing and formal accounting there was no attempt to regard one particular corporation as 'the client.' "

43. *Cf.* United States v. United Shoe Machinery Corp., 89 F. Supp. 349, 352-53 (D. Mass. 1950); Clarke v. Warwick Cycle Mfg. Co., 174 Mass. 434, 435, 54 N.E. 887, 888 (1899). *But cf.* 2 FLETCHER, CYCLOPEDIA OF CORPORATIONS § 748 (1954 ed.): "[T]he admissions or declarations of individual stockholders or members are not admissible against the corporation unless they are acting as its agents in the matter and are authorized to do so."

corporate rights in a representative action, and his vote may complete or permit desired corporate action. Thus, the shareholder's status is, in reality, neither that of agent nor that of "outsider," but something in between. Indeed, shareholders might be entitled to inspect opinions of corporate counsel along with other corporate records, unless such an opinion was prepared to aid the board of directors in litigation against the shareholder.[44] If this is true, it is hard to see how one who has the right to inspect the corporate counsel's opinions can be an outsider for the purposes of gathering information used in composing those opinions.

Perhaps the solution would be to employ the familiar distinction between the shareholder acting in his personal and in his corporate capacity. In matters relating to his own rights, or to claims adverse to the corporation, he could not speak as someone "within" the organization; in matters relating to action taken in his stockholder capacity in coordination with that of directors and officers, he could so speak. One old English decision[45] appears to hold that information communicated to corporate counsel by a group of shareholders, who were acting on behalf of the corporation, was privileged. In that case a committee of three—two shareholders and one ex-shareholder—were acting on behalf of all shareholders in settling creditors' claims against a financially embarrassed company. In a suit brought by the creditors, the privilege was held to immunize from discovery letters to the company solicitors from the committee and from individual stockholders, on the ground that these were direct communications from a party to his solicitor in regard to a pending action. On the other hand, discovery of letters exchanged between the committee and other shareholders and directors was permitted, on the ground that letters between the parties themselves, or from a stranger to a party, are not privileged even though written to be forwarded to the recipient's solicitor. "Professional privilege," said the court, "is a ground of exemption from production adopted simply from necessity . . . and ought to extend no further than absolutely necessary to enable the client to obtain professional advice with safety."[46]

The ruling as to letters sent by one party to another for forwarding to the attorney is probably not the law in England today, since a party may employ a communicating agent at least when necessary.[47] But the exclusionary ruling still seems significant because it illustrates the degree to which even a court that construes the privilege narrowly may assume that in certain circumstances the stockholder speaks for the corporation. Yet the case is perhaps distinguish-

44. This argument seems to have been rejected in Mayor & Corp. of Bristol v. Cox, 26 Ch. D. 678, 683-84 (1884), but the case is distinguishable because the action was one brought by a city corporate body against a ratepayer for slander of title, *i.e.*, for a wrong committed in his individual capacity. Compare the rule as to trust beneficiaries. 2 SCOTT, TRUSTS § 173 (1939).

45. Glyn v. Caulfield, 3 McN. & G. 463, 42 Eng. Rep. 339 (Ch. 1851).

46. *Id.* at 474, 42 Eng. Rep. at 343-44.

47. See 8 WIGMORE §§ 2317-19.

able. The stockholders may have been personally liable on the company's debts, in which event perhaps they rather than the company were the real parties and the real clients. Moreover, it does not appear whether the letters protected by the court merely contained a request for advice by managing agents on behalf of the company, or also contained information supplied by the stockholders from their own knowledge as source agents. It is the latter case alone that gives us pause.

In the absence of controlling decisions on this point, it would be a rash corporate attorney who acted on the assumption that his interviews with or in the presence of important and influential stockholders were necessarily within the privilege. Such an assumption is safe, if ever, only where it is clear that advice is being rendered to the stockholder personally as well as to the company. Short of that situation, however, corporate counsel should treat stockholders as outside witnesses unless it becomes imperative to take the risk here described.

The Lawyer's Role

It is a basic principle that the privilege extends only to confidential communications made by the client to his lawyer acting as such. Accordingly, it does not protect disclosures made to a person who happens to be a lawyer but is not acting in that capacity.[48] This aspect of the privilege raises difficulties when applied to lawyers who, as advisers to businessmen, participate in business decisions. The problem is particularly perplexing for the legal advisers of today's corporate giants. As it recently appeared in the examination of one bemused witness in regard to a claim of privilege by lawyers who handled contract negotiations for RCA, the negotiations "may have been carried on in their [the lawyers'] capacity as businessmen, but they were lawyers nevertheless. . . . They sort of left their footprints all over this picture."[49] Indeed, corporate attorneys are often employees, directors, or officers of their clients. Whether they be "outside" counsel or "house" counsel, they can rarely confine themselves to purely legal matters. Questions of policy, as well as executive guidance for matters that are partly legal, often fall within their domain. There is hardly a corporate record or memorandum of any importance that does not pass through their hands at one time or another. Their key position in the business was succinctly stated by an anonymous "Wall Street lawyer":

> "Your modern corporate lawyer is a member of the command staff of a corporation. . . . It's like the organization of an army. We like to think of the legal division as G-2."[50]

The privilege problems thus presented will be considered in terms of (1) house counsel, (2) lawyer businessmen, and (3) corporate records.

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48. 8 *id.* §§ *2296, 2300.*

49. RCA v. Rauland Corp., 18 F.R.D. 440, 443 (N.D. Ill. 1955). The witness was David Sarnoff, Chairman of the Board of RCA.

50. Mayer, *The Wall Street Lawyers,* Harper's Magazine, Jan. 1956, pp. 31, 35.

House Counsel

It is a common arrangement for a corporation to employ at least one member of the bar who receives periodic salary, uses its facilities, and works only for it. "House counsel," as he is termed, generally works at the home office but deals with the company's legal problems all over the country. Sometimes he is not admitted to the local bar in the state where the home office is located, since outside attorneys would be retained in the event of litigation or other problems requiring local specialists. Although usually considered an employee, he is by the ethics of the profession an independent contractor in the sense that his employment by the corporation should not give it the right to supervise his legal activities. But frequently his position as employee involves duties other than those of a legal adviser. What has been the courts' attitude toward the assertion of the attorney-client privilege for confidential communications between the corporation and its house counsel?

In *United Shoe*, Judge Wyzanski rejected out of hand the argument that house counsel was not qualified as an attorney for the purpose of the privilege. He pointed out, quite correctly, that the

> "type of service performed by house counsel is substantially like that performed by many members of the large urban law firms. The distinction is chiefly that the house counsel gives advice to one regular client, the outside counsel to several regular clients."[51]

A number of federal courts have recently taken the same position,[52] and several

51. 89 F. Supp. at 360. *But see* Tweed, *The Changing Practice of Law*, 11 RECORD OF ASS'N OF BAR OF CITY OF N.Y. 13, 20-21 (Jan. 1956) (14th Annual Cardozo Lecture, delivered Oct. 27, 1955):

> "The accusation that the big law firm becomes the creature of big business has been thoroughly answered many times. Logically, it is perfectly clear that the larger the law firm the more clients and more business it will have. And then no one client can mean as much financially. . . . Admittedly the situation is entirely different with respect to lawyers on the staff and payroll of a corporation. Not only is the corporation their sole source of income but because they have confined themselves to such limited work they have greatly reduced the possibilities of ever standing on their own legal feet."

Nevertheless, it is not unusual for a senior associate in a large law firm handling a corporate account to move over into the position of house counsel—and it may be doubted that his attitude is different, in any respect relevant here, as a result of the change.

52. Georgia-Pac. Plywood Co. v. United States Plywood Corp., 18 F.R.D. 463, 464 (S.D.N.Y. 1956) ("House counsel are required to have the same degree of training, skill, knowledge and professional integrity as outside counsel.") *cf.* Connecticut Mut. Life Ins. Co. v. Shields, 16 F.R.D. 5, 7 (S.D.N.Y. 1954) ("house counsel" qualifies as an attorney under "work product" rule); Scourtes v. Fred W. Albrecht Grocery Co., 15 F.R.D. 55, 58 (N.D. Ohio 1953) (same).

In Zenith Radio Corp. v. RCA, 121 F. Supp. 792, 794 (D. Del. 1954) Judge Leahy observed: "There is a privilege only if: . . . [T]he person to whom the communication was made (a) is a member of the bar of a court or his immediate subordinate and (b) is acting as a lawyer in connection with this communication. 'Outside counsel' for corporations almost invariably, and 'house counsel' ordinarily, qualify under this requirement."

state courts have assumed it *sub silentio*.[53] Accordingly, the privileged position of house counsel seems relatively assured. Nevertheless, several caveats are in order.

First, as to membership in the local bar when the corporation functions throughout the country: In *United Shoe*, the chief of the company's patent department at the home office in Massachusetts was an attorney admitted to the Massachusetts bar, and it was claimed that communications to and from the patent department qualified for the privilege. Judge Wyzanski rejected the claim, principally because "all the men in the [patent] department function less as detailed legal advisers than as a branch of an enterprise founded on patents."[54] In coming to this conclusion, Judge Wyzanski relied in part on

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Quaere whether the hesitation implied by the word "ordinarily" referred to requirement (b) as well as (a).

Compare the remarks on house counsel for the TVA in Cogdill v. TVA, 7 F.R.D. 411, 414, 415 (E.D. Tenn. 1947):

> "[I]t is not clear whether the client-attorney or the employer-employee relationship is dominant. . . .
>
> "In a government agency, . . . large and extensively departmentalized, with a coordinator, or general manager, and a board of directors, it seems reasonable to suppose that no complex matter of information would be exclusively obtained by or become the exclusive property of a single department, but would be the achievement and the property of the over-all unit; that the members of the legal staff would not be free and independent attorneys in the usual sense, but, like the information in their files, subject to the beck and call of their employer, whom otherwise they call their client. The interrogatories are addressed to the parties, not to their attorneys, and can be responded to without infringing the trust inherent in a pure attorney-client relationship."

After additional affidavits were filed, the court observed that it was "particularly impressed by so much of the supplemental affidavits as tend to show that the status of counsel for defendant is that of autonomous attorneys. . . ." *Id.* at 15.

Quaere what treatment should be accorded communications to an "outside" attorney made by "house counsel" as to matters of their own knowledge. *Cf.* Leonia Amusement Corp. v. Loew's, Inc., 13 F.R.D. 438, 440, 441 (S.D.N.Y. 1952) (appears to treat such communications as if made by the corporate client); Georgia-Pac. Plywood Co. v. United States Plywood Corp., *supra*, ("house counsel" treated, by concession, as qualified managing and communicating agent to "outside" counsel; concession was apparently made—without avail—in order to have "house counsel" treated solely as an employee).

53. *E.g.*, *In re* Hyde, 149 Ohio St. 407, 413, 79 N.E.2d 224, 227 (1948); *In re* Keough, 151 Ohio St. 307, 314-15, 85 N.E.2d 550, 553-54 (1949). *But see* Wise v. Western Union Tel. Co., 36 Del. 456, 457, 178 Atl. 640, 644 (Super. Ct. 1935):

> "In view of our conclusion [that the documents were not prepared to obtain legal advice] it may be unnecessary to consider the standing that a Legal Department of a defendant corporation would have in connection with the privilege accorded to communications with an attorney. It may be somewhat doubtful if that privilege, which had its origin in the relation of attorney and client, applies to transactions between two branches of an elaborate corporate structure. If the privilege be accorded it may conflict with the rule that upon interrogatories a corporate officer answers not only from his own information but also from that of other officers of the company."

Cf. 4 MOORE, FEDERAL PRACTICE ¶ 26.23[3] at 1105 (2d ed. 1950).

54. 89 F. Supp. at 360.

the fact that some of the assistants in the patent department either were not attorneys or were not admitted to the Massachusetts bar.[55] As a result, the decision has sometimes been thought to mean that house counsel must be admitted to the local bar to qualify for the privilege.[56] Yet the lack of such admission would only show that he was not qualified to advise on local law. It should not prevent him from acting as legal adviser on federal law, or on the law of the state where he was admitted, or on general problems common to all jurisdictions.

Judge Wyzanski was probably using the lack of local admission as little more than a make-weight. Such, at least, appears to be the interpretation recently given to *United Shoe* by Judge Leahy, who had this to say on the subject of local admission by house counsel in the *RCA* case:

> "Bar membership should properly be of the court for the area wherein the services are rendered, but this is not a sine qua non, e.g., visiting counsel, long distance services by correspondence, pro hac vice services, 'house counsel' who practice law only for the corporate client and its affiliates and not for the public generally, for which local authorities do not insist on admission to the local bar."[57]

Judge Kaufman, following Judge Leahy's view, has upheld the privilege for "house counsel" who was not admitted to the bar of his home office but spent a substantial part of his time travelling about the country; to hold otherwise, he ruled, would be "to blind ourselves to the realities which exist in the representation of a corporation national in scope with litigation reaching into many states."[58]

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55. "The fact that they [persons in the patent department admitted to the bar outside Massachusetts] though resident in Massachusetts and regularly working here, have never received a license to practice law here shows that these regular employees are not acting as attorneys for United. (The situation would be different with regard to a visiting attorney from another state, for whom the privilege might well be invoked.)" *Ibid.*

56. See 1 MORGAN, BASIC PROBLEMS OF EVIDENCE 99 n.1 (1954); Note, 5 VAND. L. REV. 590, 592 (1952); *cf.* Kent Jewelry Corp. v. Kiefer, 202 Misc. 778, 782, 113 N.Y.S.2d 12, 17, 18 (Sup. Ct. 1952) (refers with approval to attorneys and their clients "from other jurisdictions" and to an attorney "duly licensed by the state"—but what state?). *Quaere* whether it is the law of the forum state, or of the state of admission to the bar, or of the place where the consultation occurs, that governs the determination of the privilege. *Cf.* Application of Franklin Washington Trust Co., 148 N.Y.S.2d 731 (Sup. Ct. 1956) (New York law governs upon application in New York to take testimony of New York lawyer for use in pending New Jersey proceeding; opinion stresses the forum's interest in barring any disclosure).

57. Zenith Radio Corp. v. RCA, 121 F. Supp. 792, 794 (D. Del. 1954). Judge Leahy stated nonetheless that his rulings "rest" on *United Shoe*, which was "closely followed." *Ibid.* The divergence from *United Shoe* was made more explicit in Georgia-Pac. Plywood Co. v. United States Plywood Corp., 18 F.R.D. 463 (S.D.N.Y. 1956). There Judge Kaufman, holding that "house counsel" need not be admitted to the local bar, observed that in *United Shoe* "I believe the court was using non-membership in the bar as merely one factor. . . . It does not indicate that there should be automatic exclusion from the privilege when the attorney is not licensed in the state." *Id.* at 465.

58. *Id* at 466. The home office was located in New York State, and Judge Kaufman referred in passing to the possible application of New York penal sanctions, which he

A second caveat also stems from Judge Wyzanski's ruling, quoted above, with regard to the patent department of United Shoe. Such patent attorneys, in "an enterprise founded on patents," were said to be "comparable to the employees with legal training who serve in the mortgage or trust departments of a bank or in the claims department of an insurance company."[59] Would this reasoning require nonprivileged status for the legal department of an enterprise founded on litigation, such as a claims collection agency? If so, how would one distinguish the legal department from the company's regular outside counsel?

Finally, in a case where too much valuable evidence would be insulated by the privilege being accorded to house counsel, a court might be disposed to find that house counsel was actually functioning in a business capacity.[60] Although no opinion has so indicated, in such a case the mere physical proximity of house counsel, and the relative ease with which he could be converted into a privileged sanctuary for corporate records, could be used to distinguish him from outside counsel. House counsel who wishes his client to enjoy the privilege might therefore do well to segregate his business activities insofar as practicable, perhaps by keeping a log, time sheets or other records of those matters in which he was consulted for legal advice.

Lawyer-Businessmen

Under some circumstances any lawyer may be acting not as an attorney but rather as a businessman. The courts, in line with this distinction, have denied the privilege where a communication was made to a lawyer who was found to be acting as a business manager;[61] a negotiator of real estate deals,[62]

deemed irrelevant. *Id.* at 465. See N.Y. PEN. CODE §§ 270, 271; Fein v. Ellenbogen, 84 N.Y.S.2d 787 (1st Dep't 1948) (unlawful for out-of-state attorneys to confer with client in New York and prepare agreements concerning real estate); Matter of N.Y. Co. Lawyers Ass'n (Anonymous), 207 Misc. 698, 139 N.Y.S.2d 714 (Sup. Ct. 1955) (unlawful for Mexican lawyer to maintain N.Y. office and offer adivce on Mexican divorces.).

59. 89 F. Supp. at 360. Compare the reference to corporate claim departments in 4 MOORE, FEDERAL PRACTICE ¶ 26.23[8] at 1137 (2d ed. 1950).

60. Of course the scope of an attorney's employment is always relevant on this issue. See State v. Addington, 158 Kan. 276, 284, 147 P.2d 367, 374 (1944) (attorney retained only for "specific" rather than "general" advice); Humphries v. Pennsylvania R.R., 14 F.R.D. 177, 178 (N.D. Ohio 1953).

61. United States v. Vehicular Parking, Ltd., 52 F. Supp. 751, 753 (D. Del. 1943). Here the attorney was also acting as director, promotor and business manager of his corporate client, with which he shared office space. With respect to certain letters from the attorney to his client on price structure, Judge Leahy observes: "This is more than attorney-talk. It is big—as well as basic—business diction." *Ibid.* Note that certain other letters from the same attorney were nevertheless excluded as privileged. *Ibid.*

62. Avery v. Lee, 117 App. Div. 244, 102 N.Y. Supp. 12 (1st Dep't 1907) (individual client's letter and cablegrams held not privileged against discovery because they related only to the negotiating authority conferred upon attorney); *cf.* United States v. De Vasto, 52 F.2d 26, 30 (2d Cir. 1931) (transactions were "simple transfers of title to real estate rather than consultations for legal advice," and were "steps in the criminal conspiracy" besides).

loans [63] or contracts;[64] an accountant;[65] a professional investigator;[66] a bank

63. Lifschitz v. O'Brien, 143 App. Div. 180, 127 N.Y. Supp. 1091 (2d Dep't 1911) (attorney employed by individual defendant to procure loan; conversations with defendant going to the relation of principal and agent held admissible).

64. RCA v. Rauland Corp., 18 F.R.D. 440 (N.D. Ill. 1955). The negotiations here were between corporations and were handled by attorneys who represented each corporation separately. Held: individual documents to be produced in those instances "where the attorney was acting in the capacity of negotiator, or in any capacity other than advising a client on legal matters." *Id.* at 444. *Accord*, Myles E. Rieser, Co. v. Lowe's Inc., 194 Misc. 119, 81 N.Y.S.2d 861 (Sup. Ct. 1948) (pages and paragraphs of attorneys' letters dealing with negotiations held unprivileged and, for the same reason, not "work product" within *Hickman v. Taylor*; but portions of letters containing counsel's advice held privileged).

65. Olender v. United States, 210 F.2d 795, 805-06 (9th Cir. 1954) (information given by individual client for use by attorney-accountant in preparing tax returns and net worth statements held not privileged); *In re* Fisher, 51 F.2d 424 (S.D.N.Y. 1931) (information given by individual client for use by attorney-accountant in preparing financial statements held not privileged even though data also used for legal advice).

Suppose the communication were by the client to the attorney's accountant? See Himmelfarb v. United States, 175 F.2d 924, 939, 946 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949) (accountant retained by attorney treated as "third party" for purposes of privilege; the court found, however, that he was not functioning as an indispensable assistant to the attorney in the formulation of legal advice). See also Gariepy v. United States, 189 F.2d 459, 463-64 (6th Cir. 1951) (dictum that accountant employed by attorney is not entitled to the privilege). *Contra*, Walsham v. Stainton, 2 H. & M. 1, 71 Eng. Rep. 357 (Ch. 1863) (accountant treated as alter ego of attorney for purposes of the privilege). For cases applying the alter ego concept to scientific and other expert advisers of the attorney, see, in general, 70 C.J., *Witnesses* § 538 (1935). Compare N.Y. CIV. PRAC. ACT. § 353, which extends the privilege to a clerk, stenographer, or "other person employed by . . . [the client's] attorney"; 8 WIGMORE § 2301 n.1, denies that this statute does any more than codify the common law. Does the alter ego rule mean that the privilege is lost if the expert to whom the corporation communicates is employed by it rather than by the attorney? See Lalance & Grosjean Mfg. Co. v. Haberman Mfg. Co., 87 Fed. 563 (C.C.S.D.N.Y. 1898) (suggests that expert is privileged when speaking for the corporate client in so far as he acts as assistant to counsel, and not as a witness). See also cases relating to experts or special agents employed by client collected in Annot., 139 A.L.R. 1250, 1256-58 (1942).

It should be borne in mind that we have only been considering the privileged status of the client's communications to the attorney's expert. The status of the expert's own report or knowledge (under common law privilege or federal "work product") deserves a separate article. It may be noted in passing, however, that where communications from the expert are involved, privilege may conceivably depend on whether he is considered as the agent of the client or of the attorney. *But cf.* 8 WIGMORE § 2317, at 617: "[T]he communications of the *attorney's agent* to the attorney are within the privilege, because the attorney's agent is also the client's sub-agent and is acting as such for the client."

66. See O'Neill v. United States, 79 F. Supp. 827, 829 (E.D. Pa. 1948) (FBI agents are not legal advisers to the government and statements taken by them from witnesses are therefore not "work product") *rev'd on other grounds sub nom.* Alltmont v. United States, 177 F.2d 971 (3d Cir. 1949). See also the opinion of the district court in *Hickman v. Taylor*: "In taking down what various witnesses told him about the case [the attorney] was acting primarily as an investigator." 4 F.R.D. at 482. But fact-finding is usually the first task of the lawyer. The lower court in *Hickman* seems to have

executive;[67] a corporate record custodian;[68] and a would-be investor.[69] Each of these cases, so stated, fits well enough within the conventional rule that the privilege extends only to the attorney acting *as* attorney. But few of them provide much guidance for predicting the result where a lawyer mixes together business and legal activities.

In *United Shoe*, Judge Wyzanski faced this problem squarely. In attempting to explain the basis for his labels, he was aided by the fact that the case involved both categories of lawyers: the unprivileged businessman-lawyer and the privileged lawyer-businessman. He held that the company's patent department fell into the first category; house counsel and outside counsel into the latter. The distinction between them was framed in terms of a "time" test. Thus, as to the patent department Judge Wyzanski observed:

> "Grist which comes to their mill has a *higher percentage* of business content than legal content. . . . So far as the proferred evidence in this case shows, the *principal topics on which they spend time* are questions of business policy, of competition as disclosed by facts derived from third persons, of the scope of public patents. . . . They have not been shown to *spend most of their time* on the application of rules of law to facts which are known only to [the company's] employees."[70]

On the other hand, of outside counsel and, by implication, house counsel as well, he had this say:

> "They were not acting as business advisers or officers of United, even though *occasionally* their recommendations had in addition to legal points *some* economic or policy or public relations aspect and hence were not unmixed opinions of law. The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable.

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had in mind that the accident report was really a routine business record even though prepared by counsel. See note 92 *infra* and accompanying text. As to whether lawyers who are employed as claims agents are acting in a legal capacity, for the purposes of the "work product" rule, see 4 MOORE, FEDERAL PRACTICE ¶ 26.23[8], at 1136-38 (2d ed. 1950).

67. United States v. Chin Lim Mow, 12 F.R.D. 433, 434 (N.D. Cal. 1952) (business records in attorney's possession).

68. People v. Allen, 47 Cal. App. 2d 735, 746, 118 P.2d 927, 933 (1941) (attorney was also corporation's statutory agent). *Cf.* People v. Eiseman, 78 Cal. App. 223, 245, 248 Pac. 716, 725 (1926) (no privilege for attorney's employee who served as clerk, bookkeeper, and cashier for the company whose papers she identified).

69. State v. Addington, 158 Kan. 276, 286, 147 P.2d 367, 374 (1944).

70. 89 F. Supp. at 360-61. (Emphasis added.) Compare Zenith Radio Corp. v. RCA, 121 F. Supp. 792, 794 (D. Del. 1954), where Judge Leahy observed that attorney-employees of the patent department "may or may not qualify in specific instances. They do, for example, when in specific matters they are engaged in applying rules of law to facts known only to themselves and other employees of their client-companies. . . ." *Accord*, Georgia-Pac. Plywood Co. v. United States Plywood Corp., 18 F.R.D. 463, 465 (S.D.N.Y. 1956): "To the extent that particular communications were largely concerned with opinions on law, legal services or assistance in some legal proceeding, Mr. Heilman [head of the "Legal and Patent Department"] was acting as an attorney. . . ."

> And it is in the public interest that the lawyer should regard himself as more than predicter of legal consquences. His duty to society as well as to his client involves many relevant social, economic, political and philosophical considerations. And the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice."[71]

The interesting thing about Judge Wyzanski's decision—quite apart from whether one agrees with his estimate of patent work [72]—is the characterization technique he employed. Apparently the significant fact for him was not the percentage of "legal" or "business" content in the particular communication; rather, the characterization stemmed from the overall purpose, measured in terms of relative time expended, of the attorney's labors for the particular client. In other words, occasional lapses into the role of business adviser would not result in a loss of the privilege [73] any more than occasional exercises of legal advice would invoke it. It is the general impression, not the particular instance, that governs—a kind of juridical "pointillism."

Something of the same tendency to deal with general classifications rather than with individual communications has been evinced by other courts. In one New York case where the attorney was also a director the opinion states—rather too broadly—that "acceptance [of the directorship] necessarily removed him from the relation of attorney or counsel to its officers, so far as the corporate affairs were concerned. . . ."[74] This early New York decision was cited with approval by District Judge Knox, who likewise evinced blanket disapproval of the privilege where an attorney who commenced his relationship with the client as an accountant and continued in that capacity after he was admitted to the bar.[75]

On the other hand, some courts have concentrated on characterizing the particular communications, in situations where attorneys were cast in a dual

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71. 89 F. Supp. at 359. (Emphasis added.)

72. *Accord,* Kent Jewelry Corp. v. Kiefer, 202 Misc. 778, 113 N.Y.S.2d 12 (Sup. Ct. 1952). *But cf.* Zenith Radio Corp. v. RCA, 121 F. Supp. 792 (D. Del. 1954), quoted in note 70 *supra.* See Notes, 23 GEO. WASH. L. REV. 786 (1955), 51 MICH. L. REV. 601 (1953).

73. See 8 WIGMORE § 2296, at 569:

> "Where the general purpose concerns legal rights and obligations, a particular incidental transaction would receive protection, though in itself it were merely commercial in nature—as where the financial condition of a shareholder is discussed, in the course of a proceeding to enforce a claim against a corporation."

74. In the Matter of Robinson, 140 App. Div. 329, 336, 125 N.Y. Supp. 193, 199 (1st Dep't 1910) (lawyer guilty of professional misconduct when he insisted upon the privilege before a federal grand jury questioning him about corporate acts). *But cf.* Stone v. Grayson Shops, 8 F.R.D. 101 (S.D.N.Y. 1948) (attorney for defendant corporation was also its director and secretary; privilege upheld as to some questions, denied as to others without deciding capacity in which latter information was received because it came from "third persons," citing *Hickman v. Taylor*; but opinion does not state who those "third persons" were).

75. *In re* Fisher, 51 F.2d 424 (S.D.N.Y. 1931).

role.[76] In particular, Judge Leahy's recent decision in the *RCA* case[77] contrasts strongly with the technique employed in *United Shoe*. Confronted with some 1,600 documents, many of them involving the corporation's patent department, Judge Leahy refused to condemn them all but instead consented to appoint a special master to determine "the special relationship that must be found for each document separately considered."[78] The question, he said, was one of fact, and with documents written "under varying circumstances and times, one blanket ruling on their production would unnecessarily risk inaccuracies of generalization."[79] Accordingly, general but somewhat elastic ground rules were laid down in the court's opinion to serve as instructions to the special master, and illustrative rulings were provided in an appendix to the opinion.[80]

The differing approaches of Judges Wyzanski and Leahy might well be combined by considering the problem in terms of the order of proof. Although the person resisting disclosure is usually said to have the burden of proof, ordinarily he need come forward only with a modicum of evidence as to the fact of the attorney-client relationship and the nature of the disclosure.[81] Given such evidence, it is the normal inference that the disclosure was made confidentially by the client to his attorney acting as such. Likewise, where the communication is by the attorney to his client, the normal inference is that the attorney is rendering legal advice upon request, so that disclosure of the attorney's advice would probably give away the client's prior disclosures.[82] These inferences should hold despite a showing that an attorney who ordinarily

76. See, *e.g.*, cases cited in notes 61 and 64 *supra*.

77. Zenith Radio Corp. v. RCA, 121 F. Supp. 792 (D. Del. 1954).

78. *Id.* at 794.

79. *Id.* at 793.

80. *Id.* at 796.

81. See 8 WIGMORE § 2296, at 569:

> "[T]he most that can be said, by way of generalization, is that a matter committed to a professional legal adviser *is 'prima facie' so committed for the sake of the legal advice* which may be more or less desirable for some aspect of the matter, and is therefore within the privilege, unless it clearly appears to be lacking in aspects requiring legal advice."

Compare 3 JONES, EVIDENCE § 749, at 1348-49 (4th ed. 1938):

> "[I]f the proffered statement relates to a matter which is so connected with the employment as attorney as to create a presumption that it was drawn out by the relation of attorney and client, the conclusion must be that it is privileged from disclosure."

See Bacon v. Frisbie, 80 N.Y. 394, 399 (1880):

> "And whenever the communication made, relates to a matter so connected with the employment as attorney or counsel as to afford presumption that it was the ground of the address by the client, then it is privileged from disclosure. . . ."

82. *Cf.* 8 WIGMORE § 2320; Shawmut, Inc. v. American Viscose Corp., 12 F.R.D. 488 (D. Mass. 1952); *In re* Prudence-Bonds Corp., 76 F. Supp. 643 (E.D.N.Y. 1948); Minter v. Priest [1929] 1 K.B. 655, criticized in 43 HARV. L. REV. 134 (1929). *But cf.* Magida v. Continental Can Co., 12 F.R.D. 74, 77-78 (S.D.N.Y. 1951) (communication from attorney unprivileged, but seemingly treated as "work product").

acts in a legal capacity had on occasion received or given collateral business advice as an incident of his legal assistance, for, as Judge Wyzanski so aptly observed, this would be true in almost every case. Accordingly, where proof was lacking that the attorney had been acting in a distinct business capacity, the inference would continue and the person seeking disclosure would have the burden of satisfying the court that a particular communication was a business one and could be effectively segregated from the others.

On the other hand, the burden of going forward with evidence would be shifted once it was shown that the attorney had not only been active in the usual kind of legal assistance, but had also been regularly acting as a business adviser in an area that included the transaction in issue. Since the client in such a case has placed the attorney in a dual role where his true colors are hard to perceive, it should be up to the client (or the person urging his privilege) to satisfy the court that a particular communication qualifies for protection and can be effectively segregated from the others.

If this analysis is sound, it would be unwise but not necessarily fatal, insofar as the privilege is concerned, for an attorney to accept any recognized business position with his client—as director, officer, department head, or the like. Such an attorney would have to be prepared to segregate his legal activities in a clearly demonstrable fashion. The same would be true of an attorney who systematically participated in business affairs without assuming any definite business title. A corporation should certainly not be encouraged to select its business advisers from the ranks of the legal profession with a view to the special privilege of secrecy granted attorneys.

Corporate Records

Another "dual role" problem presented is this: how can the client's written communications to his attorney be protected without furnishing a privileged sanctuary for the client's business records? The problem is not unique to corporations, but the volume and variety of their business records, and the ubiquity of their lawyers, accentuate the difficulties. If the lawyer participates in the preparation of the record, then the lawyer's role and the nature of the record become overlapping questions.

The classic distinction is between "pre-existing" papers and "communicating" papers.[83] Thus, it is perfectly clear that a paper of the client prepared prior to and not for the purpose of legal consultation rises to no higher dignity when subsequently transferred to the attorney.[84] By hypothesis such "pre-existing papers" do not contain confidences stimulated by the lawyer, and should be no more privileged in the attorney's hands than they were when

83. 8 WIGMORE § 2307, at 594.

84. Grant v. United States, 227 U.S. 74, 79 (1913); Wise v. Western Union Tel. Co., 37 Del. 209, 178 Atl. 640 (Super. Ct. 1935); Jones v. Reilly, 174 N.Y. 97, 66 N.E. 649 (1902); *In re* Keough, 151 Ohio St. 307, 314, 85 N.E.2d 550, 554 (1949); *cf.* Falsone v. United States, 205 F.2d 734 (5th Cir. 1953); Monticello Tobacco Co. v. American Tobacco Co., 12 F.R.D. 344 (S.D.N.Y. 1952). *But see* Blankenship v. Rowntree, 219

in his client's possession.[85] Similarly, information gleaned by the attorney directly from a study of the "pre-existing paper" would seem to be unprivileged [86] (although in the federal courts it might now qualify for limited protection as "work product").[87] While the doctrine of the "pre-existing paper" could conceivably result in a reluctance to gather together existing data and files in a single assemblage for use by the attorney, the social interest in

F.2d 597, 599-600 (10th Cir. 1955); Liggett v. Glenn, 51 Fed. 381, 395-96 (8th Cir. 1892). See, generally, 8 WIGMORE § 2307. *But cf.* 3 JONES, EVIDENCE § 750a (4th ed. 1938).

The same distinction would seem to apply to a photograph handed to counsel by the client. *Cf.* Holm v. Superior Court, 42 Cal. 2d 500, 267 P.2d 1025 (1954) (privileged treatment accorded both accident reports and photographs); State *ex rel.* Terminal R. Ass'n v. Flynn, 363 Mo. 1065, 257 S.W.2d 69 (1953) (photographs taken by railroad's "special service departments" treated as privileged); Bloodgood v. Lynch, 293 N.Y. 308, 314 56 N.E.2d 718, 720-21 (1944) (photograph of car may be privileged). Perhaps this means that there can be no privilege unless the client took the picture. *Cf.* Shields v. Sobelman, 64 F. Supp. 619 (E.D. Pa. 1946) (photograph of winch taken under lawyer's supervision treated like the winch itself and therefore not privileged).

85. As custodian for the client, the attorney may claim on the client's behalf any privilege that the client himself might have claimed had the papers remained with the client. *E.g.*, Petition of Snow, 75 N.H. 7, 70 Atl. 120 (1908) (privilege against self-incrimination); Selden v. State, 74 Wis. 271, 42 N.W. 218 (1889) (privileged marital communication). In this respect the attorney may be the same as any other custodial agent. *Cf.* In the Matter of Ryan, 281 App. Div. 953, 120 N.Y.S.2d 110 (1st Dep't 1953) (client's privilege against self-incrimination asserted successfully by accountant entrusted with client's personal papers), *rev'd on other grounds*, 306 N.Y. 11, 114 N.E.2d 183 (1953).

86. Wigmore urges that the "communication of the [contents of the pre-existing] document is distinct from the document itself"; therefore the attorney may only be compelled to produce the pre-existing documents, and not to testify concerning the client's communication of their contents. 8 WIGMORE § 2308, at 596. See 1 MORGAN, BASIC PROBLEMS OF EVIDENCE 102 (1954). Yet suppose such a document were accidentally lost or destroyed? It is difficult to see how repetition by the client of pre-existing unprivileged records (available to others on subpoena) could have been in confidence and prompted by the relationship with the attorney unless something was added by the client which was not in the records. In contrast, where the client is communicating the contents of his own mind it is a fair inference that the substance of the disclosure was influenced by the relationship.

87. *Cf.* Alltmont v. United States, 177 F.2d 971, 978 (3d Cir. 1949), *cert. denied*, 339 U.S. 963 (1950). As to the status of a "collection of records," see Lyell v. Kennedy, 9 App. Cas. 81, 87, 93 (1883). It should be noted that the admissibility of pre-existing records, business reports and communications to lawyers acting in some other capacity have been carried over into the "work product" cases. *E.g.*, United States v. Chin Lim Mow, 12 F.R.D. 433 (N.D. Cal. 1952); Bifferato v. States Marine Corp., 11 F.R.D. 44, 46 (S.D.N.Y. 1951); Reiss v. British Gen. Ins. Co., 9 F.R.D. 610 (S.D.N.Y. 1949); Newell v. Capital Transit Co., 7 F.R.D. 732 (D.D.C. 1948). See also the Ohio accident report cases cited in note 24 *supra*. See, generally, 4 MOORE, FEDERAL PRACTICE ¶ 26.23[8] (2d ed. 1950). Unlike the privilege, the "work product" doctrine would extend to any records processed by the attorney, no matter from whom obtained. Yet a letter from client to attorney might not involve such processing. Thus the "work product" doctrine does not include the privilege but only overlaps it on one edge; moreover, unlike the privilege (to date), its protection is conditional and terminates with the particular litigation for which the record was processed.

furthering legal assistance does not require absolute protection for the assemblage. One can easily imagine the improper use to which such a privileged sanctuary could be put, and this no doubt explains the refusal to carry the privilege so far.

It follows that business correspondence, accountants' books, inter-office reports, file memoranda, minutes of business meetings, and all the other mountains of papers accumulated by modern enterprises would ordinarily not qualify for the privilege even though they were subsequently transmitted to counsel. Perhaps the act or circumstances of transmission would be privileged if significant in themselves, and no doubt the request for advice itself, since it reveals something more than is in the papers, would also qualify.[88] But the contents of the pre-existing records would remain unprivileged.

Suppose, however, that the records are prepared by or at the instance of counsel. Some of the state accident report cases suggest that the employee's report is privileged only if submitted to counsel for use in pending or anticipated litigation.[89] Yet such a test seems wrong on two counts. On the one hand, it would apparently extend the privilege to accident reports that are rendered to counsel as a matter of routine, litigation being viewed as just around the corner in every instance: it does not provide a touchstone for segregating the unprivileged portion that is mixed into such reports.[90] On the other hand, the imminence of litigation is a useful negative test only where there is no other reason for legal advice. It may well be that accident reports need not be prepared for counsel unless litigation is in the wind, but this is not true of other kinds of factual reports prepared by or submitted to counsel, particularly since litigation is usually the least portion of the corporate lawyer's work.

Again, the problem should be handled in terms of the order of the proof. Once the person seeking disclosure demonstrated that the particular record

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88. *Quaere* whether the privilege would extend to the minutes of a directors' meeting discussing the need for calling upon counsel. *Cf.* Mayor & Corp. of Bristol v. Cox, 26 Ch. D. 678, 682, 685 (1884) (privilege extends to minutes of corporate committees discussing litigation and to a printed report on this subject circulated between the committees and the corporation).

89. See cases cited in note 27 *supra*. After an early struggle in England, it has long been settled that the privilege applies to any legal consultation, whether or not for the purpose of litigation. 8 WIGMORE §§ 2294, 2295. See *In re* Williams' Estate, 179 Misc. 805, 39 N.Y.S.2d 741, 744 (Surr. 1942); People v. Warden of County Jail, 150 Misc. 714, 717, 270 N.Y. Supp. 362, 366 (Sup. Ct. 1934). The federal notion of attorney's "work product," on the other hand, is limited to preparation for suit because it is grounded in the code duello of adversary litigation. To the extent that the state accident report cases tend to make the imminence of litigation an absolute prerequisite, they are crossing over into the area of "work product."

90. *Cf.* Holm v. Superior Court, 42 Cal. 2d 500, 512, 267 P.2d 1025, 1031-32 (1954) (even routine accident reports privileged if "dominant purpose" was to use them in litigation; concurring/dissenting opinion says test should be whether the report would not have been prepared but for this use; neither opinion considers possibility of requiring segregation of privileged and unprivileged information). Compare note 92 *infra*.

was one that the company would ordinarily maintain for itself without regard to counsel, it would be prima facie the equivalent of a "pre-existing" record; it would then be unprivileged unless its disclosures were affirmatively shown to have been prompted by the need for legal advice. The imminence of litigation would be merely one way—and not necessarily a conclusive one—of demonstrating the significance of the lawyer's intervention.[91] As before, if the record mixed together business and privileged material, it would fall upon the corporation, which is the party responsible for the confusion, to segregate the privileged portion from the unprivileged.

By thus returning to first principles, by insisting on satisfactory proof that the corporation's special frankness in its records was the result of its need for counsel, the courts could avoid too broad a rule, but without narrowing unduly the circle of corporate spokesmen or limiting the functions of counsel to the area of preparation for litigation.[92] In practice, the approach suggested would mean that form reports, routine questionnaires and the like would almost never be privileged, but detailed interviews conducted by an attorney and recorded by him would frequently qualify. Companies producing large masses of paper work would get less benefit from the privilege than those which ordinarily have skimpier records, but any privilege necessarily favors the close-mouthed.

Multiple Participation of Corporate Representatives

Not all communications between client and attorney are protected. They must be made "in confidence," else the privilege never attaches, and they must be kept "in confidence," else the privilege is lost.[93] The rule is a fairly

91. I submit that the recommended application of the "pre-existing record" doctrine would dispose of situations where the company sought to label every accident report, no matter from whom taken or by whom obtained, as being destined for the confidential use of counsel. See, *e.g.*, Dugger v. Baltimore & O.R.R., 5 F.R.D. 334 (E.D.N.Y. 1946) (general counsel issued instruction letter that all accident reports were to be for his confidential use in possible litigation). In *Hickman v. Taylor* the amicus curiae brief of the United Railroad Workers of America, at p. 5, pointed to the *Dugger* case as a dreadful example of what would happen unless all statements by employees were held unprivileged. See note 36 *supra*.

92. The lower court in *Hickman v. Taylor* stressed the fact that "there were compelling reasons for taking the statements of the survivors, entirely unconnected with any anticipated suits for damages . . . [such as] general safety considerations and a due regard for their obligations to the public, as well as their own interest, in view of the possibility of unfounded or unfair criticism." 4 F.R.D. at 482. See also note 66 *supra*. Yet in that case the company had no regular investigators of its own, these same employees had already testified at a public steamboat inspector's hearing, and the attorney himself had been expressly retained to defend in the "anticipated litigation." *Ibid.* Moreover, it seems anomalous to characterize an attorney's factual interviews as business records simply because his findings are so reliable that the company might well, as a secondary benefit, rely on them in its business. In the common experience of the practicing attorney, his probing of the employee usually is a good deal more thorough than the standard accident report or even the conclusions of an investigation board.

93. 8 Wigmore § 2311.

easy one to observe when the attorney is dealing with an individual client. The interviews are held behind closed doors with no one else present, except perhaps for a stenographer or law clerk; the client is then cautioned not to repeat his disclosures elsewhere, and not to send copies of his written communications to anyone else. These simple measures are usually efficacious.[94]

With a corporate client, the problem is more difficult. Corporate actions, be they letters, reports, decisions or consultations, are typically products of staffs and groups of persons, rather than of any single individual. Papers intended for counsel usually circulate within the corporation—acquiring the stamps or comments of the various offices through which they pass—both before and after they have reached counsel, and file copies of such papers may be stored in the corporation's own open records as a matter of course. As a result, a large number of persons have knowledge of a disclosure and are in a position to repeat it to the outside world.

The interrelated privilege problems thus presented will be considered in the following order: (1) confidentiality within the organization, (2) waiver by a corporate agent, and (3) litigation between agent and corporation.

Confidentiality Within the Organization

In the case of an individual client, the traditional rule is that only persons necessary to the communication may be present at his confidential conference with counsel; anyone else is a "third party" whose presence spoils the privilege.[95] The rigidity with which the rule has been followed justifies a suspicion that it rests not only on an implied waiver or consent, but also on a policy against permitting the privilege to silence too many people.[96] Thus there is

94. See, generally, cases collected in Annot., 53 A.L.R. 369 (1928); 8 WIGMORE § 2301; 58 AM. JUR., *Witnesses* §§ 492-94, 518 (1948). *Cf.* Solon v. Lichtenstein, 39 Cal. 2d 75, 79-80, 244 P.2d 907, 910 (1952) (client's prior repetition of statement to others shows it was not regarded as confidential when told to his attorney); Drew v. Drew, 250 Mass. 41, 144 N.E. 763 (1924) (client showed letter to others).

95. See 1 MORGAN, BASIC PROBLEMS OF EVIDENCE 102-03 (1954):

> "The requirement of confidence . . . implies . . . that the means of transmission shall not, to the knowledge of the client, disclose the information to any person other than one reasonably necessary to accomplish the transmission, and that it be disclosed to no one not necessary for the accomplishment of the purpose for which it was transmitted."

See also 8 WIGMORE § 2311, at 602:

> "Here, even if we might predicate a desire for confidence by the client, the policy of the privilege would still not protect him, because it goes no further than is necessary . . . and the presence of a third person (other than the agent of either) is obviously unnecessary for communications to the attorney as such. . . ."

See also note 34 *supra*.

96. *Compare* Bowers v. State, 29 Ohio St. 542, 546 (1876) (mother of youthful prosecutrix in bastardy proceeding was present to inspire frankness from her daughter and thus acted as a confidential agent; held: privileged), *with* Gordon v. Robinson, 109 F. Supp. 106 (W.D. Penn. 1952) (client's stepson present during conference in hospital; held: unprivileged). See also Parnacher v. Mount, 248 P.2d 1021 (Okla. 1952); Wright

even authority holding that an eavesdropper, or a purloiner of the client's letter to counsel, is not bound by the privilege; in that situation, however, the privilege remains in force as between client and attorney, because the disclosure to the "third party" was not a voluntary one.[97]

In the case of a corporation, it is possible that the communication—at least while it is en route to counsel—need be kept confidential only as between the corporate entity and the outside world.[98] In *United Shoe* Judge Wyzanski suggested this,[99] and in the *RCA* case Judge Leahy seemed to follow his view.[100] Their opinions also indicate, or assume, that any corporate employee who is not a "third party" for the purpose of qualification as spokesman is,

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v. Quinn, 201 Okla. 565, 207 P.2d 912 (1949); Ratzloff v. State, 122 Okla. 262, 249 Pac. 934 (1926). See DRINKER, LEGAL ETHICS 135 (1953): "[The rule against disclosure] would apply if the third party was present in such capacity as to be identified with the client; for example, where the mother [n.48] or a friend [n.49] of the client accompanied the client to the lawyer, seeking his advice." Drinker's note 48 cites Bowers v. State, *supra*; his note 49 cites Op. No. 420 of the Bar Ass'n of the City of N.Y., which indicates that the legal privilege is inapplicable but refers to cases stressing the attorney's duty of loyalty.

97. 8 WIGMORE §§ 2325(3), 2326. See note 34 *supra*.

98. Compare cases holding that dictation by a corporate officer to his stenographer is not a corporate communication to a "third person" within the meaning of the slander law, because of the corporate entity notion. *E.g.*, Mims v. Metropolitan Life Ins. Co., 200 F.2d 800 (5th Cir. 1952), *cert. denied*, 345 U.S. 940 (1953).

99. "[Protection may be afforded for] information which was secured from an officer or employee of defendant and which was not disclosed in a *public document*." 89 F. Supp. at 361. (Emphasis added.) The opinion also refers to the privilege being lost by the presence of "strangers" or "third persons" or "outsiders." *Id.* at 358, 359, 360, 361. There is no definition of these terms, except that a patent or a judicial opinion are given as illustrations of a "public document." *Id.* at 359. *See* Edison Elec. Light Co. v. United States Elec. Lighting Co., 44 Fed. 294, 298 (C.C.S.D.N.Y. 1890) (a patent case cited by Judge Wyzanski):

> "[I]f the document thus confidentially prepared [as a result of the consultation with counsel] is not so kept, if the contract is by the client executed with some *third person*, or the notice is given or the letter sent to some *outsider*, its contents are no longer confined to the knowledge of client and counsel, and the party can no longer, as to a document which he has thus *made public*, claim that it is privileged because it is confidential." (Emphasis added.)

100. See Zenith Radio Corp. v. RCA, 121 F. Supp. 792, 795 (D. Del. 1954):

> "[There is a privilege only if] the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers. . . . In this case, the corporation is the client. 'Strangers' are those not affiliated with the corporation as employees, officers, directors, or 'outside counsel'."

Accord, Connecticut Mut. Life Ins. Co. v. Shields, 18 F.R.D. 448 (S.D.N.Y. 1955) (member of bridge commission obtained information at conference in which other members, commission's counsel and joint clients participated; privilege upheld, without discussion). *But see* Livezey v. United States, 279 Fed. 496, 499 (5th Cir.), *cert. denied*, 260 U.S. 721 (1922) (disclosure to corporate counsel by president in presence of two other officers held unprivileged on the ground, *inter alia*, that "third parties were present"; however, the president's disclosure involved his embezzlement of corporate funds and may have been made in a personal rather than a corporate capacity).

as a matter of logic, not a "third party" or "outsider" for the purpose of confidentiality. Similarly, the state accident report cases have not evinced any objection to the report passing upward through organizational channels before crossing into the hands of counsel.[101]

A related question is whether copies of documents intended for counsel may be retained in the corporation's open files. In one recent case a corporation inadvertently permitted the government to copy certain letters to counsel which were in its open files; a federal district court held that the privilege had been waived, observing:

> "It is difficult to be persuaded that these documents were intended to remain confidential in the light of the fact that they were indiscriminately mingled with the other routine documents of the corporation and that no special effort to preserve them in segregated files with special protections was made. One measure of their continuing confidentiality is the degree of care exhibited in their keeping, and the risk of insufficient precautions must rest with the party claiming the privilege."[102]

Similarly, a number of the state accident report cases contain dicta that the report, to qualify for the privilege, must ultimately be turned over to counsel (or to the legal department) and remain continuously in their possession thereafter.[103]

Yet it is an accepted principle that the privilege protects both client and attorney from forced disclosure of the client's confidences;[104] accordingly, the privilege should apply with equal force to the client's own copies of letters to his attorney.[105] The only valid objection to letting the client keep a copy for himself would be the possibility that it might be shown to "third parties." Thus the filing question, as applied to corporations, seems to reduce itself to this: are there persons within the organization who should be prevented

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101. See cases cited in note 27 *supra.*

102. United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 465 (D. Mich. 1954). Note also the remark that the documents were not "work product" because they "were apparently circulated among the interested officials of Budd and it does not appear that they resided in the patent counsel's work files when pulled by the Government's representatives." *Id.* at 465.

It does not appear how the nearly 800 exhibits involved in *United Shoe* were stored, but in a companion case "thousands of strictly intra-corporate documents"—perhaps including the 800—were described as having been kept "in its [the corporation's] own files" without being "disclosed to third persons." 89 F. Supp. at 351 (1950). *Cf.* Mayor & Corp. of Bristol v. Cox, 26 Ch. D. 678, 682, 685 (1884) (privileged treatment for report on litigation circulated within the corporation).

103. See *In re* Keough, 151 Ohio St. 307, 85 N.E.2d 550 (1949) (syllabus); Davies v. Columbia Gas & Elec. Co., 68 N.E.2d 571, 579 (Ohio C.P. 1938); Atchison, T. & S.F. Ry. v. Burks, 78 Kan. 515, 526, 96 Pac. 950, 953 (1908).

104. 8 WIGMORE § 2324.

105. *But cf.* People v. Rittenhouse, 56 Cal. App. 541, 206 Pac. 86 (1922) (document found in cell by sheriff after prisoner had been removed; court refuses privilege to document even though prisoner intended to send it to counsel). See 70 C.J., *Witnesses* § 585 n.59 (1935).

from seeing or hearing confidential communications to counsel, or is privacy from the "outside" world sufficient?

The problem here is not to decide who is qualified as corporate spokesman but rather to fix the number of persons who should be allowed privileged knowledge of disclosures obtained from one or more of them. It does not necessarily follow that counsel should always be permitted to interview all the directors in a privileged group merely because he may speak to them *seriatim*, nor that counsel may report a privileged communication to any officer he chooses. To take a more extreme example, I very much doubt that *United Shoe* would have permitted the privilege if a mass meeting of the patent department and all inventor-employees had been called to listen in on a disclosure to counsel. Equally, I assume that *United Shoe* would not deny the privilege merely because one or two nonsource agents—file clerks for example— had subsequently read the report.

I suggest that the decisive factor for a court should be the impracticality of drawing a line for privacy narrower than that followed within the organization itself as a matter of routine. The corporation's own internal security practices, whatever they might be, should ordinarily be indicative of its desire for secrecy, and suspicions that information is being circulated unnecessarily within the organization should not be lightly entertained.

It is conceivable, of course, that cases may arise where persons within the organization are seeking to use the privilege as a guise for communicating with each other on business matters, either orally or in writing. Here again, in substance, the problem is to distinguish between a conference with counsel and a business consultation at which counsel was present. It should be handled, again, in terms of the order of proof: if it is shown that the number of persons participating in the conference or in the preparation or actual use of the document is such that there appears to have been a business consultation, then it should fall upon the corporation to come forward with proof of its legal and confidential nature.

Meanwhile, until the question has been further clarified by the courts, the safest procedure is for counsel to insist, insofar as practical, that conferences be limited in number, that papers be circulated only among persons essential to the disclosure, and that documents addressed to counsel be placed in a confidential file.

Waiver by a Corporate Agent

In general, the capacity to waive the corporation's privilege by disclosure to an "outsider" should go hand-in-hand with the authority to seek legal advice on behalf of the corporation; and it should go no further. For instance, a source agent or a communicating agent who confers with the attorney at the corporation's behest is not necessarily the one who makes the decision on behalf of the corporation to seek legal advice. Equally, such an agent might not have the authority to waive the privilege on behalf of the corporation, even though he was himself the source of the corporate disclosure being protected.

(Of course, he could still be required to testify as to his own knowledge.) On the other hand, a managing agent with express or implied authority to select legal advisers and to seek legal advice would also have the authority to decide for the corporation whether information disclosed should be kept confidential or not.

If this analysis is correct, a disclosure to anyone outside the ambit of corporate confidence, by an officer or other supervisory agent of sufficient status, should be construed as a waiver of privilege by the corporation.[106] Perhaps it would be possible to make sure that subordinates or other persons of middle stature within the organization would not be considered as having authority to waive, by labeling a particular record "Not to be Circulated Outside the Company Without the Approval of ————" or by other appropriate directions in advance. If a higher ranking officer violated such instructions, of course, he might well be held to have had implied authority to issue new instructions himself. But even agents of the highest authority might be explicitly deprived of their status altogether, or of authority to waive, between the time of their original disclosure to counsel and the time when they allegedly waive.

In this connection the corporate attorney who also has business responsibilities in the organization should exercise special care, for although it is usually said that a subsequent disclosure by the attorney will not constitute a waiver unless the client's consent can be shown or implied,[107] a disclosure by an attorney who was also a managing agent of the corporation would probably constitute a waiver by the corporation.[108]

For the same reasons, it would be well for "house counsel" to keep in mind that, unlike "outside counsel," he may have implied authority as a matter of course to disclose information on the corporation's behalf and, therefore, to waive its privilege. Equally, an attorney who has express authority to negotiate or deal with a third party probably has implied authority to disclose any information obtained from the client in regard to that transaction;[109] for he is acting as a business agent as well as a legal adviser.[110]

Litigation between Agent and Corporation

It is a settled rule that the privilege does not apply, *inter sese*, when two or more persons, having shared a single attorney on a matter of common interest,

106. *Cf.* Stewart Equipment Co. v. Gallo, 32 N.J. Super. 15, 107 A.2d 527 (L. 1954), where defendant urged that witness, a vice-president and sales manager of the corporation, had waived by his prior testimony. The court held that there could be no waiver without a showing of authority to waive, but implied that the result would have been different if the witness had been a director. Should not the test here have been whether witness had authority to give the prior testimony?

107. 8 WIGMORE § 2325. See Himmelfarb v. United States, 175 F.2d 924, 939 (9th Cir. 1949) (implied consent).

108. *Cf.* United States v. Vehicular Parking, Ltd., 52 F. Supp. 751 (D. Del. 1943) (attorney who was also a director produced documents for Justice Dep't; corporation could not later claim privilege for the documents).

109. See, *e.g.*, Rediker v. Warfield, 11 F.R.D. 125, 127 (S.D.N.Y. 1951).

110. Compare the cases cited in notes 61-64 *supra*.

subsequently have a falling out with respect to the subject matter of the consultation.[111] The *inter sese* rule, as I shall term it, should be distinguished from waiver by one of the joint clients, which results in a loss of the privilege in suits brought by outsiders, as well as between the parties. Also, a joint client may waive only for his own statements, but the *inter sese* rule applies to joint statements and to those made by the other client.[112]

The *inter sese* rule is usually explained on the ground that the client could not have intended secrecy with respect to the persons in whom he confides.[113] Another explanation would be that the exception is necessary if the shared transaction is to be fairly stated in subsequent litigation between the parties.[114]

111. See cases in Annot., 141 A.L.R. 553 (1942); 8 WIGMORE § 2312. The ALI's Model Code states the "well settled law" as follows:

> "When two or more persons acting together become clients of the same lawyer as to a matter of common interest, none of them has as against another of them any privilege . . . with respect to that matter."

MODEL CODE OF EVIDENCE rule 211 (1942).

If the client anticipated at the outset a conflict between himself and the persons to whom he permitted disclosure, there should probably be no privilege at all, even as against outside parties. *Compare* Root v. Wright, 84 N.Y. 72 (1881) (adverse parties unite in seeking advice from common attorney; privileged as to outsiders), *with* Harris v. Daugherty, 74 Tex. 1, 11 S.W. 921 (1889) (attorney was acting for one party only; no privilege).

112. Wigmore states that waiver should be joint for joint statements, that neither can waive for the disclosure of the other's statements, and that neither can obstruct the other in the disclosure of his own statements. 8 WIGMORE § 2328. As to waiver, *compare* People v. Patrick, 182 N.Y. 131, 175, 74 N.E. 843, 857 (1905) (accomplice who had joint counsel with defendant permitted to testify that he told his counsel of his own guilt) *with* State v. Archuleta, 29 N.M. 25, 31, 217 Pac. 619, 621 (1923) (*inter sese* rule distinguished here on ground that defendant who turned state's witness was not the party-plaintiff, hence his statements to joint defense counsel could not be disclosed by the defense without the witness' own waiver).

Morgan observes that the *inter sese* rule applies whether or not the joint clients were all present at the time of the communication, because "A communication by one relative to the common subject matter, to be kept secret from the others, would savor of fraud." 1 MORGAN, BASIC PROBLEMS OF EVIDENCE 104 (1954). *But cf.* cases in 70 C.J., *Witnesses* § 551, at 411 n.60 (1935). However, the court's task is easier where all parties were present, since the statements of the other party are then admissible either because there was a joint consultation or because a "third party" was present and no privilege attached. *E.g.*, La Barge v. La Barge, 284 App. Div. 996, 135 N.Y.S.2d 317 (3d Dep't 1954); *cf.* Cafritz v. Koslow, 167 F.2d 749, 751 (D.C. Cir. 1948).

113. See 8 WIGMORE § 2312, at 603: "[The communications] are not privileged . . . between the two original parties, inasmuch as the common interest and employment forbade concealment by either from the other." Compare Annot., 141 A.L.R. 553, 554-55 (1942): "[Joint client's] communications to [the common attorney] in the presence of each other, or his statements to them, are obviously not intended to be confidential as between themselves, and accordingly are not privileged as between the conferees. . . ."

114. *See, e.g.*, Horowitz v. Le Lacheure, 101 A.2d 483, 487 (R.I. 1953): "So long as such a disclosure is directed . . . to the promotion of justice in a controversy between two clients arising out of a common or joint undertaking in which the attorney acted for both, the privilege against disclosure is removed." Viewed in this way, the *inter sese* rule would not apply if the subject matter of the litigation was unrelated to the consultation.

Viewed in this way, the joint client cases are not dissimilar from those which permit an attorney to disclose his client's confidences to the extent necessary to recover his fee or to defend himself from accusations by the client.[115]

Joint client situations may be expected to occur with some frequency in corporate consultations. Indeed, a single person may be speaking for two clients. For example, a director discusses with corporate counsel a corporate business opportunity of which he had availed himself personally. Subsequently, a stockholder commences a derivative action against the director and demands a copy of the interview. If the director was alone with counsel, then it may be he was seeking personal advice, on the understanding that his communications would not be revealed to the corporation. In that event, the privilege is his alone. However, if another director were present, or if the consulting director indicated that his information was to be shared with the corporation, then the consultation would appear to be either on behalf of the corporation alone, or on behalf of the two clients jointly; in either event, the director could not prevent production of the interview in the suit brought for the corporation. But if the plaintiff were someone other than the corporation—in a criminal case, for example—the *inter sese* rule would have no application; instead, the state would have to show either that the conversation was unprivileged at the outset[116] or else that the privilege belonged solely to the corporation, which could waive it by allowing the attorney to testify.[117]

Apart from joint consultations, difficult questions may arise concerning the extent, if any, to which the *inter sese* rule should apply in subsequent controversies between the corporation and its agents. I suggest that an agent who on behalf of the corporation has spoken to its attorney—like the attorney himself—should be permitted to reveal confidential communications

115. *E.g.*, Browning v. Potter, 129 Colo. 448, 271 P.2d 418 (1954); Moore v. State, 231 Ind. 690, 111 N.E.2d 47 (1953) (prisoner claims counsel was inadequate); Leverich v. Leverich, 340 Mich. 133, 64 N.W.2d 567 (1954); Shelton v. Gwathmey, 201 Misc. 75, 107 N.Y.S.2d 653 (Sup. Ct. 1951) (suit for attorney's fee). See, generally, 58 AM. JUR., *Witnesses* § 514 (1948). Of course this exception should not operate to permit the attorney to clear his reputation where the charges against him are made by some one other than his client. *But see* United States v. Weinberg, 129 F. Supp. 514, 522 (D. Pa. 1955) (government's criminal charges).

116. Livezey v. United States, 279 Fed. 496, 499 (5th Cir.), *cert. denied*, 260 U.S. 721 (1922) (*semble*). Compare Becher v. United States, 5 F.2d 45 (2d Cir. 1924), *cert. denied*, 267 U.S. 602 (1925), where a principal and his attorney interviewed a hostile agent whom they suspected of having misused the principal's money. The court ruled that the interview was "in no sense" privileged, because it was "between the client on the one hand and a third person on the other, as an opposed party." See note 13 *supra*.

117. *E.g.*, State v. Ross, 312 Mo. 510, 279 S.W. 411 (1926); *cf.* Schneider v. Leigh, [1955] 2 Q.B. 195 (C.A.) (accident victim sues for libel by company doctor who examined him; doctor's report delivered to plaintiff by company solicitor, thus waiving the privilege, which belonged solely to the company). *Cf.* Leyner v. Leyner, 123 Iowa 185, 98 N.W. 628 (1904) (client may waive his privilege for statements to attorney made by his wife as his agent); Bingham v. Walk, 128 Ind. 164, 27 N.E. 483 (1891) (same).

when necessary, *inter sese*, to justify his fee or defend his conduct.[118] Beyond that, disclosure should not be permitted merely because the client once reposed a confidence in his agent, unless the subject matter of the controversy is so interwoven with the agency that there is no other way in which the transaction can be fairly stated between the parties.

CONCLUSION

To test and summarize the principles outlined in this paper, and to point up the differences between the corporate and the individual privilege, assume the somewhat complicated but perhaps not infrequent case of a joint conference with corporate counsel, involving both the corporation, acting through agents, and another person seeking legal advice for himself (such as, say, a stockholder). Both conferences might take place together without loss of the privilege if there were a mutual problem and mutual trust, but their differing aspects must be kept in mind. The corporation's agent would have to qualify as spokesman for the corporate client before the privilege could exist at all for the corporation; naturally no such qualification would be necessary in regard to disclosures made on the agent's own behalf. Because they could be merely disguised business records, corporate papers prepared for counsel would be subjected to a jealous scrutiny which personal papers would probably escape. The corporation's disclosures could probably circulate in confidence within its own organization; the individual could not consent to any disclosure to others except as a necessary incident of the joint consultation. The corporation's agent would not himself have to be contemplating legal advice for it unless he was of such stature as to act for the corporation in this respect; the individual would have to be seeking it. The corporation's agent could not waive the privilege for it unless authorized to do so; the individual could waive for himself. The corporation and individual could each waive for their own disclosures to counsel, but neither could waive for those made by, or made jointly with, the other. Between the corporation on the one hand, and the individual

118. The authority to date is to the contrary, but may be distinguishable on the facts. Blankenship v. Rowntree, 219 F.2d 597 (10th Cir. 1955) (disclosure by individual's communicating agent not permitted in agent's suit for services; however, the agent sought to use the communication to prove collateral matters as well as those related to his agency); *In re* Busse's Estate, 332 Ill. App. 258, 75 N.E.2d 36 (1947) (client's business manager not permitted to introduce client's admissions of indebtedness made in presence of manager and attorney for purpose of obtaining legal advice), criticized, 15 U. CHI. L. REV. 989, 61 HARV. L. REV. 717 (1948); Foley v. Poschke, 137 Ohio St. 593, 31 N.E.2d 845 (1941) (private detective present at client's conference with attorney when client apparently communicated her matrimonial difficulties; disclosure not permitted in agent's suit for services, but it does not appear whether the disclosure was necessary).

If directors *A* and *B* are both present and speak for the benefit of the corporation at a conference with corporate counsel, should *A* be permitted to show what he himself said in order to prove the value of his services? Should *A* be permitted to show what *B* said? Should the result be any different if *B* were speaking to *A* as well as to the attorney?

on the other, there would be no privilege in litigation *inter sese*. The corporate privilege probably would terminate upon dissolution of the legal entity;[119] the individual's privilege would pass to his legal representative.[120]

* * *

As is so often the case, the task has been not so much to discover the rule as to make a conscious choice. Nearly all the questions discussed here stem from the fact that traditionally the attorney-client relationship has been a highly personal one. Just as difficulties have been experienced in applying the ethics of that personal relationship to expanded notions of legal services (referral services, legal insurance programs, and the like), so difficulties will be experienced in protecting the confidences granted lawyers who serve the highly impersonal and complex corporate organizations of our time. Ultimately it is the fundamental assumption to which I first referred which has the last word on this subject. The more deeply one is convinced of the social necessity of permitting corporations to consult frankly and privately with their legal advisers, the more willing one should be to accord them a flexible and generous protection. No doubt this is obvious, but as the story of the Emperor's new clothes illustrates, sometimes even a statement of the obvious is useful.

119. See MODEL CODE OF EVIDENCE rule 209(c)(ii) (1942).
120. See 8 WIGMORE § 2329.

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